United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

B

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

VOLUME 16 — TRIAL TRANSCRIPT — Pages 4614 to 4873-14

UNITED STATES COURT OF APPEALS
FILED
MAY 19 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

CRAVATH, SWAINE & MOORE
Attorneys for Plaintiff-Appellant
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3000

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
(212) 644-8000

BERNARD KORMAN, Esq.
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

Attorneys for Defendants-Appellees ASCAP, et al.

HUGHES HUBBARD & REED
Attorneys for Defendants-Appellees Broadcast Music, Inc., et al.
One Wall Street
New York, New York 10005
(212) WH 3-6500

STROOCK & STROOCK & LAVAN
Attorneys for Defendant-Appellee Warner Bros. Inc.
61 Broadway
New York, New York 10004
(212) 425-5200

SIMPSON THACHER & BARTLETT
Attorneys for Defendants-Appellees MCA, Inc., and Duchess Music Corp.
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

LINDEN & DEUTSCH
Attorneys for Defendants-Appellees G. Schirmer, Inc., and Associated Music Publishers, Inc.
110 East 59th Street
New York, New York 10022
(212) 758-1100

HOFHEIMER, GARTLIR,
GOTTLIEB & GROSS
Attorneys for Defendants-Appellees Essex Music, Inc., and Hollis Music, Inc.
100 Park Avenue
New York, New York 10017
(212) 725-0400

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

COURT PAPERS

VOLUME 1

	PAGE
Docket Entries	JA1
Complaint	JA19
Exhibit A	JA31
Exhibit B	JA33
Exhibit C	JA35
ASCAP Answer and Counterclaim	JA37
Excerpts from BMI's Answer and Counterclaim	JA64
Reply to ASCAP's Counterclaim	JA79
Reply Memorandum in Support of BMI's Motion for Preliminary Injunction, dated July 9, 1970	JA94
Appendix	JA115
Transcript of Proceedings of July 10, 1970	JA132
Affidavit of Amalya L. Kearse, sworn to April 26, 1971	JA170
Excerpts from Appendix to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, dated August 16, 1971	JA177
ASCAP's Reply Memorandum in Support of its Motion for Summary Judgment, dated September 3, 1971	JA185
Transcript of Proceedings of September 14, 1971	JA197

VOLUME 2

PAGE

Excerpts from Plaintiff's Memorandum in Support of Its Rule 37 Motion to Compel Answers to Interrogatories, and Production of Documents, dated August 25, 1972 ..... JA305

ASCAP Memorandum in Opposition to CBS' Motion to Compel Answers to Interrogatories and Production of Documents, dated September 27, 1972 ..... JA314

Excerpts from CBS' Memorandum in Opposition to ASCAP's Motion for a Protective Order dated September 29, 1972 JA338

Excerpts from ASCAP's Trial Brief dated April 25, 1973 ..... JA342

Excerpts from BMI Trial Memorandum dated April 25, 1973 JA353

Excerpts from Plaintiff's Post-trial Brief dated April 8, 1974 JA358

Excerpts from ASCAP's Post-trial Brief dated June 3, 1974 JA361

BMI's Post-trial Brief dated June 3, 1974 ..... JA370

Opinion and Order of Lasker, J. dated September 22, 1975 ..... JA584

TRIAL TRANSCRIPT*

VOLUME 3

	PAGES
Donald Sipes:	
Direct	14–149
Cross	150–328

VOLUME 4

Donald Sipes (concluded)	
Cross (concluded)	329–379
Redirect	380–381
Recross	382–397
Robert B. Wright:	
Direct	397–475
Cross	476–553
Redirect	553–560
Recross	561–562

* Corrections to the trial transcript appear at the close of each day's transcript:

pages of transcript	*corrections at pages*	*pages of transcript*	*corrections at pages*	*pages of transcript*	*corrections at pages*
1 to 127	127-1 to 127-8	1799 to 1954	1954-1 to 1954-4	3576 to 3748	3748-1 to 3748-12
128 to 328	328-1 to 328-8	1955 to 2108	2108-1 to 2108-7	3749 to 3919	3919-1 to 3919-13
329 to 563	563-1 to 563-6	2109 to 2458	2458-1 to 2458-10	3920 to 4081	4081-1 to 4081-9
564 to 753	753-1 to 753-5	2459 to 2623	2623-1 to 2623-6	4082 to 4241	4241-1 to 4241-10
754 to 908	908-1 to 908-4	2624 to 2801	2801-1 to 2801-5	4242 to 4426	4426-1 to 4426-10
909 to 1089	1089-1 to 1809-4	2802 to 2995	2995-1 to 2995-16	4427 to 4613	4613-1 to 4613-11
1090 to 1273	1273-1 to 1273-4	2996 to 3176	3176-1 to 3176-8	4614 to 4731	4731-1 to 4731-5
1274 to 1445	1445-1 to 1445-6	3177 to 3378	3378-1 to 3378-14	4732 to 4873	4873-1 to 4873-14
1447 to 1632	1632-1 to 1632-5	3379 to 3524	3524-1 to 3524-5		
1633 to 1798	1798-1 to 1798-8	3525 to 3575	3575-1 to 3575-2		

PAGES

Edward Duke Vincent:
Direct 571–647
Cross 647–671

VOLUME 5

Edward Duke Vincent (concluded):
Cross (concluded) 672–726
Redirect 726–730

George A. Sunga:
Direct 731–759
Cross 759–770

Albert Berman:
Direct 771–851a
910–965
Cross 965–977
Redirect 978–987

Marion B. Mingle:
Direct 852–885
Cross 885–888
Redirect 888–889
Recross 889–890

Burton Lane:
Direct 988–999

VOLUME 6

Burton Lane (concluded):
Direct (concluded) 1000–1160
Cross 1161–1172
Redirect 1172–1176

Allen H. Arrow:
Direct 1255–1360

VOLUME 7

	PAGES
Allen H. Arrow (continued):	
Direct (concluded)	1361–1536
Eugene Goodman:	
Direct	1537–1592
Cross	1593–1600
Leon Kellman:	
Direct	1604–1631

VOLUME 8

Franklin M. Fisher:	
Direct	1636–1767
Cross	1768–1785
Walter L. Dean:	
Direct	1799–1823
Cross	1824–1861
Redirect	1862–1865
Allen H. Arrow (concluded):	
Cross	1962–1996
Redirect	1997–2003
Recross	2003–2005
Further Redirect	2006
Irwin Segelstein:	
Direct	2009–2032
Cross	2032–2042

VOLUME 9

Emil Poklitar:	
Direct	2044–2074
Cross	2074–2100
Redirect	2101–2102
Paul Marks:	
Direct	2400–2571
Cross	2571–2623

VOLUME 10

	PAGES
Paul Marks (concluded):	
Cross (concluded)	2624–2728
Salvatore Chiantia:	
Direct	2854–2910
Cross	2910–2932

Volume 11

Salvatore Chiantia (concluded):	
Cross (concluded)	2933–3058
Redirect	3058–3062
Recross	3062–3064
Alan Shulman:	
Direct	3065–3096
Cross	3097–3136
Redirect	3137–3138

VOLUME 12

Michael Dann:	
Direct	3213–3299
Cross	3299–3378
	3411–3439
John Green:	
Direct	3440–3460
Cross	3460–3476
Aaron Copland:	
Direct	3478–3487

PAGES

Arnold Broido:
Direct 3488–3497
Cross 3497–3501

VOLUME 13

Herman Finkelstein:
Direct 3577–3660
Cross 3660–3829
Redirect 3829–3837

Robert R. Nathan:
Direct 3842–3919

VOLUME 14

Robert R. Nathan (continued):
Direct (continued) 3920–3968
Cross 3969–4206

Paul Marks:
Direct 4207–4221
Cross 4221–4241

VOLUME 15

Edward Cramer:
Direct 4244–4289
Cross 4290–4358

Paul Rosenthal:
Direct 4358–4375
Cross 4376
Redirect 4376
Recross 4377–4378

Peter Q. Steiner:
Direct 4378–4420
Cross 4420–4473
Redirect 4473–4475
Recross 4475–4480

Robert R. Nathan (concluded):
Direct (concluded) 4526–4556
Cross (concluded) 4557–4613

VOLUME 16

	PAGES
Fred Silverman:	
Direct	4733–4759
Cross	4759–4766
Redirect	4766
Franklin M. Fisher:	
Direct	4767–4852
Cross	4853–48[illegible]
Redirect	4863–4864

DEPOSITIONS

VOLUME 17

	PAGE
Excerpts from the Deposition of Stanley Adams	D1
Excerpts from the Deposition of Allen H. Arrow	D66
Excerpts from the Deposition of Al Brackman	D70
Excerpts from the Deposition of Leon Brettler	D111
Excerpts from the Deposition of Salvatore Chiantia	D263

VOLUME 18

Excerpts from the Deposition of Cy Coleman	D331
Excerpts from the Deposition of Paul Fagan	D347
Excerpts from the Deposition of Herman Finkelstein	D546
Excerpts from the Deposition of Sidney Herman	D624

VOLUME 19

	PAGE
Excerpts from the Deposition of Edwin H. Morris	D641
Excerpts from the Deposition of William S. Paley	D761
Excerpts from the Deposition of Emil D. Poklitar	D766
Excerpts from the Deposition of Frank Stanton	D852
Excerpts from the Deposition of Jerry Vogel	D911
Excerpts from the Deposition of Ned Washington	D938
Excerpts from the Deposition of Philip B. Wattenberg	D991
Excerpts from the Deposition of Robert D. Wood	D1013

EXHIBITS

VOLUME 20

Court Exhibit ("CX") No. 2—Stipulation between CBS and ASCAP, dated 5/25/72, in this action	E1
CX 2, Exhibit No. 1—Standard form of CTN "Television Affiliation Agreement", dated 2/66	E11
CX 2, Exhibit No. 2—Standard form of ASCAP writer and publisher membership agreement, Form 10M-1-72U, covering the years 1966-1975	E19
CX 2, Exhibit No. 3—Standard forms of ASCAP "Application for Writer-Membership", Form 4M 11-71, with attached form of cover letter, and "Application for Publisher Membership", Form 2M 6-71, with attached form of cover letter	E24
CX 2, Exhibit No. 4—Standard form of ASCAP writer and publisher membership agreement, Form 2500 7-65, covering the years 1941-1965	E36
CX 2, Exhibit No. 5—Form of ASCAP "Television Performing Rights Agreement", supplementing the membership agreement (CX 2, Ex. 4) to include television performing rights	E41

PAGE

CX 2, Exhibit No. 6—List of "ASCAP Affiliated [Foreign] Repertories", dated 1972 ..... E44

CX 2, Exhibit No. 7—Form of ASCAP Performing Rights Agreement used in connection with the foreign performing rights licensing societies listed in CX 2, Ex. 6 above, wherein ASCAP grants rights to licensee E46

CX 2, Exhibit No. 8—Form of ASCAP Performing Rights Agreement used in connection with the foreign performing rights licensing societies listed in CX 2, Ex. 6 above, wherein licensor grants rights to ASCAP E56

CX 2, Exhibit No. 9—"Articles of Association of the American Society of Composers, Authors and Publishers", dated 1/70 E68

CX 2, Exhibit No. 10—Amended Consent Judgment, dated 3/14/50, *U.S.* v. *ASCAP* (Civil Action No. 13-95) E124

CX 2, Exhibit No. 11—Order, dated 1/70/60, and attachments as amended to date in *U.S.* v. *ASCAP* (Civil Action No. 13-95) E139

CX 2, Exhibit No. 12—Pamphlet, whose cover is a letter, dated 6/28/63, from Stanley Adams "To All Members of the Society", describing the pamphlet's contents as "The ASCAP Survey" by Dr. Joel Dean, which Judge McGeehan suggested be distributed to all ASCAP members E209

CX 2, Exhibit No. 13—ASCAP Financial Statements for the calendar years 1960-1969, with attached cover letters from Stanley Adams to "Dear Member", dated 4/11/61, 4/19/62, 4/1/63, 4/18/64, 4/15/65, 4/20/66, 4/24/67, 4/4/68, 4/2/69, 4/9/70, respectively E254

CX 2, Exhibit No. 14—Standard forms of ASCAP license agreements, currently in effect:

Title	*Form No.*	
Local Station Blanket Radio License	5M-11-69-U	
Local Station Per Program Radio License	7500-9-67	
Local Station Blanket Television License Agreement	—	
Local Station Per Program Television License Agreement	—	E285

CX 2, Exhibit No. 15—Standard forms of ASCAP license agreements, preceding the current forms (CX 2, Ex. 14):

		PAGE
Title	*Form No.*	
Local Station Blanket Radio License	3M-3-67	
Local Station Program Sustaining License	160	
Local Station Blanket Television License	1M-12-67	
Local Station Per Program Television License	1000 Jan. 1967 (u)	E354

VOLUME 21

CX 2, Exhibit No. 16—Certificate of Incorporation of Broadcast Music, Inc., dated 10/13/39 ..... E371

Court Exhibit No. 3—Stipulation between CBS and BMI in *CBS* v. *ASCAP*, dated 10/15/71 ("So Ordered 10/26/71") E386

Plaintiff's Exhibit No. 12—Finkelstein Affidavit, dated 6/25/70 in *U.S.* v. *ASCAP (NBC Application)* E390

Plaintiff's Exhibit No. 14—Finkelstein Affidavit, dated 7/10/70 in *U.S.* v. *ASCAP (NBC Application)* E405

Plaintiff's Exhibit No. 24—Excerpts from ASCAP Brief on Appeal, dated 3/30/71, *United States* v. *ASCAP* (*Matter of Zekley*) E415

Plaintiff's Exhibit No. 53—AGAC Uniform Popular Songwriters Contract, bearing copyright dates: 1948 (SPA) and 1969 (AGAC) E430

Plaintiff's Exhibit No. 84—Letter dated 10/29/59 from Salvatore Chiantia to Miriam Stern E439

Plaintiff's Exhibit No. 102—Post-1970 pamphlet, "ASCAP—The Facts" E441

Plaintiff's Exhibit No. 106—Stanley Adams' "Remarks—AGAC Meeting, Hotel Edison, October 28" E448

Plaintiff's Exhibit No. 123—Letter dated 11/4/65 from Harold Spina to Miriam Stern E458

Plaintiff's Exhibit No. 124—Letter dated 11/19/65 from Michael H. Goldstein to Burton Lane E461

Plaintiff's Exhibit No. 125—Memorandum dated 1/24/66 from Abel Baer to Donald Kahn enclosing AGAC Counsel "Report to the West Coast Committee" dated 1/12/66 ..... E465

Plaintiff's Exhibit No. 127—Memorandum dated 4/22/66 from Leon Kellman to Burton Lane E470

PAGE

Plaintiff's Exhibit No. 133—Excerpt from "Report to New York AGAC Counsel from the West Coast Committee" dated 5/11/67 ..... E475

Plaintiff's Exhibit No. 134—Letter dated 5/18/67 from Burton Lane to Vic Mizzy E477

Plaintiff's Exhibit No. 135—Memorandum dated 7/25/67 from Burton Lane to AGAC West Coast Committee E480

Plaintiff's Exhibit No. 137—Excerpt of Report of the AGAC West Coast Committee Meeting dated 5/10/66 ..... E484

Plaintiff's Exhibit No. 162—Memorandum dated 10/19/59 from Miriam Stern to Alan Shulman enclosing Lane-Bernstein letters 10/2/59, 10/6/59, 10/14/59 and 10/15/69 ..... E486

Plaintiff's Exhibit No. 405—Blanket Network Television License Agreement between NBC and ASCAP, dated 1/10/58 as of 1/1/58, covering the period 1/1/58 through 12/31/61 (furnished by ASCAP as Exhibit M in connection with ASCAP Answer, dated 6/30/70 to CBS Interrogatory 28) E491

Plaintiff's Exhibit No. 430—ASCAP Supplementary Answer, dated 3/15/73, to CBS Interrogatory No. 26 ..... E533

Plaintiff's Exhibit No. 442—Form of BMI publisher affiliation agreement used from January 1959 to March 1969 (furnished by BMI as Exhibit 1 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory No. 9) E537

Plaintiff's Exhibit No. 443—Two forms of BMI publisher affiliation agreement used from March 1969 to August 1970 (furnished by BMI as Exhibit 2 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory No. 9) E543

Plaintiff's Exhibit No. 449—Two forms of BMI writer affiliation agreement used from December 1968 to July 1970 (furnished by BMI as Exhibit 8 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory 9) E552

PAGE

Plaintiff's Exhibit No. 458—BMI Answer, dated 3/23/73, to CBS Interrogatory No. 26 ..... E561

Plaintiff's Exhibit No. 469—BMI Writer Payment Schedule in effect as of January 1, 1972 (Dated September 1972) E563

Plaintiff's Exhibit No. 470—BMI Publisher Payment Schedule in effect as of January 1, 1972 (Dated September 1972) E570

Plaintiff's Exhibit No. 471A—BMI-Publisher Affiliation Agreement with a publisher where no previous agreement between the parties existed E577

Plaintiff's Exhibit No. 471B—BMI-Publisher Affiliation Agreement with a publisher canceling and superseding any prior agreement between the parties E582

Plaintiff's Exhibit No. 472—Current form of BMI-Writer Affiliation Agreement E587

Plaintiff's Exhibit No. 513—Affidavit of Edward M. Cramer, in this action, dated 10/21/70 ..... E592

Plaintiff's Exhibit No. 517—Memorandum of defendants ASCAP, et al. (by Paul Weiss), dated 11/10/71, in this action E598

Plaintiff's Exhibit No. 567—Excerpts from Statement of Herman Finkelstein, General Attorney for ASCAP on Hearing Before Special Subcommittee of the Judiciary Committee of the House of Representatives in Connection with Its Study of the Anti-Trust Laws, September 18, 1956 ..... E606

Plaintiff's Exhibit No. 568—Excerpts from Deposition of H. Finkelstein in *Cascade Broadcasting Co.* v. *ASCAP* E611

Plaintiff's Exhibit No. 572—Excerpts from deposition of Edward Cramer in *BMI* v. *NBC* E627

Plaintiff's Exhibit No. 575—ASCAP's Reply Memorandum (by Sullivan & Cromwell) dated 5/1/70, *United States* v. *ASCAP (Application of NBC)* E633

PAGE

Plaintiff's Exhibit No. 579—BMI pamphlet, "You—and the Music You Use", dated 7/69 ..... E646

Plaintiff's Exhibit No. 689—Letter dated 10/29/64 from Allen Arrow to George Lee E652

Plaintiff's Exhibit No. 722—AGAC Bulletin dated May 1966, Volume 3, No. 2 ..... E655

Plaintiff's Exhibit No. 839—Music Study, Summaries of Transactions, Songs and Plays of All Performances for 17 ASCAP Publisher Groups E660

Plaintiff's Exhibit No. 840—Music Study, Summaries of Transactions, Songs and Plays of Feature and Qualifying Performances for 17 ASCAP Publisher Groups E671

Plaintiff's Exhibit No. 866—Draft, dated 11/1/65 of 3MPX 27 .... E682

Plaintiff's Exhibit No. 899—Respondent's Conditional Offer of Proof, 4/17/62, *U.S.* v. *ASCAP (Shenandoah)* E692

VOLUME 22

Plaintiff's Exhibit No. 900—Transcript of 34th Annual Meeting of AGAC, November 1965 ..... E731

Plaintiff's Exhibit No. 908—Affidavit of Michael Dann, sworn to July 7, 1970, in this action E808

Plaintiff's Exhibit No. 962—H. Finkelstein Affidavit 12/21/61, in *U.S.* v. *ASCAP (Shenandoah)* E815

Plaintiff's Exhibit No. 986—Letter dated November 12, 1971, from Alan J. Hruska to Jay H. Topkis E825

Plaintiff's Exhibit No. 987—Letter dated November 18, 1971, from Jay H. Topkis to Alan J. Hruska E829

Plaintiff's Exhibit No. 992—Letter from Allan Blumstein to Alan J. Hruska dated February 12, 1974 ..... E831

3MPX No. 2—Memorandum dated 7/6/64, "ASCAP Performance Fee Proposal; 3M-700 Outright Sale Unit" E833

PAGE

3MPX No. 4—Letter dated 8/18/64 from J.M. Collins to Allen Arrow E838

3MPX No. 7—Letter dated 8/27/64 from J. M. Collins to Allen Arrow E840

3MPX No. 11—Memorandum "Tentative Proposal to ASCAP from 3M for Use in Connection with the 3M-700 Series" E842

3MPX No. 18—Letter dated 6/28/68 from Allen Arrow to M.E. Ricketts E845

3MPX No. 19—Letter dated 7/4/68 from Mr. M.E. Ricketts to Allen Arrow E847

3MPX No. 27—Letter dated 11/15/65 from Burton Lane to "Dear Publisher" E849

3MPX No. 42—Memorandum dated 12/28/74 from Allen Arrow to Milton Kramer E853

3MPX No. 43—Memorandum dated 1/12/65 from Milton Kramer to Allen Arrow E858

3MPX No. 47—Letter dated 7/15/65 from Alan L. Shulman to Allen Arrow E860

3MPX No. 49—Letter dated 10/11/65 from Allen Arrow to R.E. Lindgren E862

3MPX No. 72—Letter dated 11/17/65 from Lee V. Eastman to Allen Arrow E864

3MPX No. 75—Letter dated 4/22/66 from Allen Arrow to R.E. Lindgren E866

3MPX No. 144—Letter dated 11/5/64 from R.E. Lindgren to Arthur Israel E871

3MPX No. 145—Letter from E. C. Timberlake to A. Arrow, dated 12/1/64 ..... E874

3MPX No. 168—Memorandum dated 11/19/65 from Alan Shulman to Harold Richmond E879

PAGE

3MPX No. 171—Letter dated 12/4/64 from Allen Arrow to Phillip B. Wattenberg enclosing copy of a letter dated 11/27/64 from R. E. Lindgren to M. E. Ricketts E881

ASCAP Exhibit No. 126—CBS-BMI Television Network Blanket License dated 1950 with letters extending to 1969 ..... E888

ASCAP Exhibit No. 127—CBS-ASCAP TV Network Blanket License Agreements dated 10/17/49, 2/19/54 ..... E907

VOLUME 23

ASCAP Exhibit No. 127 (concluded)—CBS-ASCAP TV Network Blanket License Agreements dated 1/10/58 and 12/19/69 1042

ASCAP Exhibit No. 175—ASCAP-ABC Blanket License for ABC Television Network dated 1/10/58 ..... E1138

ASCAP Exhibit No. 184—Letter dated 10/2/59 from Burton Lane to "Gentlemen" E1229

ASCAP Exhibit No. 193—Contract dated November 5, 1965, between 3M and Fred Ahlert Music Corp. E1231

ASCAP Exhibit No. 194—Contract dated November 5, 1965, between 3M and Ahlert-Burke Corp. E1244

ASCAP Exhibit No. 195—Contract dated August 23, 1965, between 3M and Barton Music Corp. E1257

ASCAP Exhibit No. 196—Contract dated January 22, 1965, between 3M and Bourne Co. E1268

ASCAP Exhibit No. 197—Contract dated October 1, 1965, between 3M and Brandom Music Corp. E1278

ASCAP Exhibit No. 198—Contract dated February 2, 1966, between 3M and Chippendale Music Co. E1289

VOLUME 24

PAGE

ASCAP Exhibit No. 199—Contract (unexecuted) dated June 1, 1965, between 3M and Compton Music Corp. E1300

ASCAP Exhibit No. 201—Contract dated June 5, 1965, between 3M and Consolidated/Dorsey Bros. E1309

ASCAP Exhibit No. 202—Contract dated July 26, 1965, between 3M and Criterion Music Corp. E1319

ASCAP Exhibit No. 203—Contract dated August 19, 1965, between 3M and Four Jays Music Inc. E1328

ASCAP Exhibit No. 204—Contract dated April 14, 1966, between 3M and Frank Music Corp. E1339

ASCAP Exhibit No. 205—Contract dated October 1, 1965, between 3M and Holloway Publishers, Inc. E1352

ASCAP Exhibit No. 206—Contract dated January 25, 1965, between 3M and Jewel Music Publishing Co. E1361

ASCAP Exhibit No. 207—Contract dated July 26, 1965, between 3M and Joy Music, Inc. E1371

ASCAP Exhibit No. 208—Contract dated October 1, 1965, between 3M and International Korwin Corp. E1379

ASCAP Exhibit No. 209—Contract dated March 1, 1965, between 3M and Leeds Music Corp. E1390

ASCAP Exhibit No. 210—Contract dated March 15, 1966, between 3M and Mills Music Inc. E1400

ASCAP Exhibit No. 211—Contract dated March 15, 1966, between 3M and Pic Corporation E1412

ASCAP Exhibit No. 212—Contract dated August 3, 1966, between 3M and Ray Music Co. E1423

ASCAP Exhibit No. 213—Contract dated September 1, 1965, between 3M and Ross-Jungnickel Music Inc. E1432

ASCAP Exhibit No. 214—Contract dated September 7, 1966, between 3M and St. Nicholas Music Inc. E1446

ASCAP Exhibit No. 215—Contract dated February 21, 1966, between 3M and Sam Fox Publishing Co. E1458

PAGE

ASCAP Exhibit No. 216—Contract dated September 1, 1965, between 3M and Southern Music Publishing Co. E1471

ASCAP Exhibit No. 217—Contract dated January 25, 1965, between 3M and Shapiro, Bernstein & Co., Inc. E1486

ASCAP Exhibit No. 219—Contract dated October 1, 1965, between 3M and Laurel Music Corp. E1496

ASCAP Exhibit No. 222—Contract dated April 2, 1965, between 3M and Hi-Ti Music Corp. E1507

ASCAP Exhibit No. 223—Contract dated November 5, 1965, between 3M and Milene Music, Inc. E1517

ASCAP Exhibit No. 290—Agreement dated as of 7/1/67 between CLGA and Producers E1529

ASCAP Exhibit No. 326—Gitter Affidavit dated 6/17/74 in this action E1563

BMI Exhibit No. 114—BMI Consent Decree dated December 29, 1966 ..... E1568

BMI Exhibit No. 166—Letter from Edward Cramer to CBS dated October 29, 1969 ..... E1579

Hruska

4614

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DOCUMENT COPY ENTERED

COLUMBIA BROADCASTING SYSTEM	
vs.	Before: HON. MORRIS E. LASKER, District Judge.
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL	

New York, December 13, 1973

STENOGRAPHER'S MINUTES

not

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURTHOUSE

Columbia Broadcasting System

vs. 69 Civ. 5740

American Society of Composers
Authors and Publishers, et al

New York, New York.
December 13, 1973
10:00 A.M.

(Trial resumed.)

MR. TOPKIS: Could I, your Honor, ask your indulgence as to one matter? The annual reports to stockholders, 161, I think I withdrew it or something like that or perhaps you told me I couldn't have it in, but I just want to press it again because in our pretrial brief we made three statements which we believe pertinent and for which we have no evidentiary support except the stockholders statements.

I think they are indisputable fact and perhaps we can resolve it that way.

In the annual report for 1972 CBS stated that it is "The World's largest manufacturer and seller of records and tapes."

That is from Page 11 of the 1972 annual report.

If Mr. Hruska will so stipulate or stipulate that they said that, I don't have any need for the report.

The second is a statement also from the 1972 annual report namely, that the television network is "The world's largest advertising medium,"

And the third also from the 1972 annual report is to the effect that WCBS-FM, the New York station, has "The largest audience level of any FM station in the United States."

THE COURT: Well, I agree that those facts are relevant.

Do you want to stipulate to them or put them in?

MR. HRUSKA: I would like to say an objection for the record, your Honor, because I don't believe that any of those facts are relevant to the case.

THE COURT: The objection is overruled and under the circumstances, do you prefer -- do you have any preference about how the material is put in the record?

MR. HRUSKA: Well, I would certainly prefer that, left with those options, that the three statements that Mr. Topkis has just read go in rather than the entire annual reports.

MR. TOPKIS: That is satisfactory.

MR. HRUSKA: Do you have the dates on those?

MR. TOPKIS: They are all the 1972 annual reports.

THE COURT: Then, without waving the objection

to relevance, Mr. Hruska stipulates that the 1972 report makes such statements or it is not contested, anyway, is that correct?

MR. HRUSKA: Well, that is correct, your Honor. I suppose one of us when we go back will double check it but I have very little question that Mr. Topkis has read it accurately.

THE COURT: All right.

MR. TOPKIS: Now, your Honor, if we may now come to a group of exhibits and I think we were just about to go into 1973, and there are five exhibits that I think might perhaps be considered simultaneously. They are 173, 174, 176, 77 and 78.

THE COURT: I thought we discussed this yesterday.

MR. TOPKIS: All of them, in any event, relate to the same subject. That is to say, the licenses which we entered into with ABC and NBC in Judge Ryan's court pursuant to notice given to CBS of the terms and conditions of those licenses and they embrace also, I believe, one of them, 176, the transcript of remarks made on that occasion by CBS counsel, Mr.Green, who was there at the time.

MR. HRUSKA: First of all, Mr. Green's statement

it seems to me, are not admissible. We went through this. I remember when we were putting in documents, your Honor, we went through this about statements by outside counsel during the course of hearings, statements made in open court.

I remember we had a brief discussion --

THE COURT: About Mr. Finkelstein, for example?

MR. HRUSKA: No. About Mr. Dean, as a matter of fact, and also Mr. Topkis in the Cascade action in Yakima, and I had indicated that I thought at the time that we had done some work on that and that it was admissible as an admission and I did pull out the memorandum that I had had prepared on it, by a summer associate, and we did some further work on it and it turned out that statements by outside counsel made in the course of an oral argument or hearing in another case are not admissible and we never offered those documents for that reason, because we saw that the law really went against us on it.

MR. TOPKIS: Forgive me for interrupting, but I am not offering the documents as any admission. I am offering them as a statement of position by CBS to Judge Ryan as to how and where it felt its remedy lay as to claims that it had about improprieties in the ABC license and claims that it had as to the kinds of license that it was

entitled to.

MR. HRUSKA: That seems to me like another way of saying an admission, your Honor.

THE COURT: I think that the status of that would be an admission. It may not be a confession of a crime, something of that sort, but it is an admission in the sense that you wish to stick CBS with the consequences of the statement, I take it.

MR. TOPKIS: Well, the fact of their attendance, the fact that they deliberately stood silent and said what they did say, not as an admission of its truth, but as a statement that that was CBS's position, inducing Judge Ryan, inducing is perhaps too strong a word --

MR. HRUSKA: I should think so.

MR. TOPKIS: But a statement which permitted Judge Ryan to go forward. Perhaps had CBS not said what it did, Judge Ryan would have done something else.

He thought it appropriate that CBS have notice. CBS responded to the notice by attending through the person of Mr. Green who has represented CBS many, many times in rate-fixing proceedings before Judge Ryan.

THE COURT: What bothers me about this, though, is the same thing that concerned me about Mr. Hruska's proposal that he put in a part of the transcript.

Regardless of whether you call it an admission or not, what I stressed in those discussions when Mr. Hruska made the proposal was my concern that I wouldn't get a true picture of the entire situation by putting in bits and pieces of paper and then having an argument made in a brief that if this is really a significant matter, I would prefer to have the witness called, even now I would prefer to have the witness called and you ask him whether he did say something or he didn't, and so forth, and give an opportunity to have brought out whatever ought to be brought out on the other side, if there is anything.

So I am reluctant to receive it for that purpose. That such an order was issued, that CBS was there, that much I would agree with you I would accept it for, but if we are going to go into what CBS's position was, I wouldn't want to decide it solely on the basis of this document.

I am perfectly willing to have you cross-examine a witness on the basis of the document, if you wish to.

MR. TOPKIS: Well, I don't have any desire to, your Honor. All I have desire to is to have Mr. Green acknowledge what I know he would never deny, that he was there and said these words on behalf of CBS.

THE COURT: Well, then, I am agreeable to accepting that subject to Mr. Hruska's right, if he wishes to, to call Mr. Green for any supplemental explanations.

MR. HRUSKA: Your Honor, I think we are really off into a real detour here. This was a proceeding between ASCAP and ABC, CBS was not a party to this proceeding.

It was a proceeding in which ASCAP and ABC, as has been done through the years, called upon Judge Ryan to in effect approve a settlement between ASCAP --

THE COURT: Between them?

MR. HRUSKA: Between ASCAP and ABC.

Now, I would believe, your Honor, most probably with the thought of setting up some sort of position against CBS, ASCAP gave notice of the pendency --

MR. TOPKIS: That was on Judge Ryan's direction.

MR. HRUSKA: The pendency of the proceeding to CBS. Mr. Green was at that proceeding and I don't think there is any question about that

THE COURT: Did any of you pers-nally participate in this situation?

MR. TOPKIS: No, your Honor.

MR. HRUSKA: No, I didn't.

THE COURT: That is one of the problems.

MR. TOPKIS: EXcept Mr. Green.

THE COURT: Mr.Green, are you in a position to tell me how CBS came to be at the meeting?

MR. GREEN: Yes. There were proceedings -- this is without any refreshing my recollection on it, your Honor, but there were proceedings separately, ABC brought or appeared before Judge Ryan, and we received notice of the hearing. We were not parties to it. EAch of the proceedings before Judge Ryan even though they are all in the United States against ASCAP, was a separate proceeding, separately captioned.

We were not parties to the ABC proceeding. We were not parties to the NBC proceeding. We received a notice of them.

In the past I had learned in some of Judge Ryan's proceedings that when you received a notice if you didn't show up he would sometimes take offense. We did not participate as active parties in either of those hearings.

THE COURT: Thank you, Mr. Green.

Do you want to continue?

MR. HRUSKA: The continuance of this, simply, your Honor, is I don't see how a proceeding to which CBS was not a party, even if it was physically attended by Mr. Green, it was outside counsel for CBS in consent decree

matters, could have any effect whatsoever on CB S or on this lawsuit, and I think this material, in addition to the other objections I have stated to it, is entirely irrelevant to the case.

MR. TOPKIS: I understand, your Honor, that CBS is here saying that we should be enjoined from issuing licenses, of a blanket variety to ABC and NBC. CBS had an opportunity before Judge Ryan while this action was pending to object to our entering into blanket licenses.

MR. HRUSKA: In a case to which we were not a party.

MR. TOPKIS: Yes. You were given notice so you might come in and object. That is exactly what the Judge said in this transcript.

jbe 1

THE COURT: Why don't we settle this by letting me see if I can get you to agree as to a statement of the facts and then I'll decide whether they have any significance or not or whether they are relevant and that is, I understand that in October of 1972, in connection with a settlement between ABC and ASCAP only Judge Ryan ordered notice of the meeting to be given to CBS and because it received notice from Judge Ryan, an attorney from CBS did attend the meeting and that attorney did not express any objection to the settlement which included among other terms the granting of a blanket license from ASCAP to ABC.

Is that what you want me to know?

MR. TOPKIS: That's right.

MR. HRUSKA: I don't believe that is right, your Honor.

THE COURT: How is it incorrect?

MR. HRUSKA: Because I believe Mr. Green's position expressed at that hearing was that in view of the fact A we weren't parties to it--

THE COURT: I understand that that is not disputed.

MR. HRUSKA: And in view of the fact also that the ABC ASCAP agreement was expressed in terms of a lump sum, that there was no allocation of that lump sum and we had no

knowledge regarding the background of that agreement or the allocation of the sum or the significance of the sum.

THE COURT: Let me interrupt, Mr. Mruska.

I must say that I really don't think, Mr. Topkis, that the fact that CBS didn't object in the circumstances that we have described would carry any weight with me here in deciding whether or not they were entitled to such relief in this situation.

I think we all have to recognize the realities of the situation, that as this case has developed, ideas have developed, too, and the failure to take a position in support of a certain proposition at an earlier time when the whole concept had not really jelled isn't very much proof necessarily of an inconsistent position, but merely of a change of approach and change of idea now.

Furthermore, I am not even sure that it is fatal to a litigant present position to have taken a position in the past. The question would still remain whether the relief requested is appropriate or is not appropriate and without suggesting that the proposed relief is appropriate, I am going to deny the offer of these documents for purposes indicated.

MR. TOPKIS: Very well, your Honor.

Your Honor makes that ruling as to--

THE COURT: As to the items to which it applies

which I gather are 176 and 7and 8, are they?

MR. TOPKIS: Well, it would be 173, 174, 176, 177 and 178, because they all relate to ABC and NBC.

THE COURT: It is all the same point, anyway.

MR. TOPKIS: Yes.

All right, your Honor. That brings us, I think, to 179, which was just the old blanket license that we had with NBC television network.

THE COURT: I must say I don't understand why that--

MR. TOPKIS: It is only an interest in the dealings, the history.

MR. BRUSKA: It is in evidence already.

MR. TOPKIS: That's good.

Your Honor, we now come to three documents, one is AX 180, 181 and 182.

THE COURT: All letters of Broido.

Who is Alan Finnel?

MR. TOPKIS: Someone at the Harry Fox agency.

It all relates to the Carol Burnett Show's use of the Fox Agencies to clear and the time interval in advance that they had. These were used in examining one of the producers, I believe.

THE COURT: They intended to show that it would

take sometime to go through this system--

MR. TOPKIS: No. They are intended to show that it takes almost no time to do it.

THE COURT: I thought that's what CBS was trying to show, too, but all right.

MR. HRUSKA: I don't think these documents show very much of anything but I don't have any objection to them.

THE COURT: Well, if they cast any light on how it all operates, all right.

MR. TOPKIS: That's all.

(AX 180, 181 and 182 received in evidence.)

MR. TOPKIS: 187 to 192 are already received.

We then come to 224 and with your Honor's position, Mr. Blumstein will go into these matters.

MR. BLUMSTEIN: 193--

MR. HRUSKA What are these?

MR. BLUMSTEIN: The 3M contracts.

MR. HRUSKA: I have a little problem on that.

Bob Baker told me about two minutes before we started that his batch of papers pertinent to that were uniformly left at the offices and he went back to the offices at 10. He ought to be here in five minutes.

THE COURT: We will reserve those.

MR. TOPKIS: I'll go ahead with 224.

THE COURT: 224 is open, still.

MR. TOPKIS: Yes.

MR. HRUSKA: Is this a clearance sheet?

MR. TOPKIS: Yes, this was used at the examination of Mr. Poklitar, your Honor, and he was asked about how they cleared music as part of showing how it is done.

THE COURT: And this is simply for information?

MR. TOPKIS: That's right.

THE COURT: Received.

(AX 224 received in evidence.)

MR. HRUSKA: I do have an objection to this document and this is going to be common, I think, to an objection to 14 or 15 BMI documents in the same area.

There was a good deal of examination of Poklitar at his deposition regarding 14 or 15 music logs that Poklitar his secretary at CBS, had made up and that BMI had collected for a period of years; logs which indicated that in some cases the music clearance section couldn't clear or they had gotten bad information from the band leader at a football game or things of that nature and all this examination, as I understand it, your Honor, and I am not the proponent of the relevance of this, but as I understand it, all of it wasput in in an attempt to show that Mr. Poklitar did not, was not performing up to optimum standards.

In some cases some logs slipped up or what have you.

I just don't think that the experience of the music clearance section at CTN with respect to these 15 or so logs over a period of, I don't know what it was, five or ten years, really means anything.

If it is offered to indicate that we would have trouble implementing a per use system it certainly means nothing because in a per use system everything changes.

The submission of these logs now becomes more than a chore. It becomes the basis of payment.

The fact that Mr. Poklitar and his several assistants didn't perform up to snuff in 15 cases over the past umpteen years certain doesn't mean that that music clearance section or whatever new section is brought to bear on this new world, new problem in the future isn't going to perform.

There is just no inference that can be drawn from that past experience in the future.

THE COURT: Let me see if your opponents do agree with your description of the alleged relevance.

MR. TOPKIS: That's not what it is for at all.

This is a CBS Music Clearance Sheet for a show called Lamp Unto My Feet, not a fat ball game or anything

like that and it used nothing but unpublished and public domain music and for the life of me I don't know why we thought it pertinent but it is in two sheets and I can't see how anybody can be hurt.

THE COURT: Mr. Hruska thought this was typical of a whole group.

MR. DAVIDSON: It was possibly typical of a group that BMI intends to put in.

THE COURT: Mr. Gitter?

MR. GITTER: This document, I don't recall why was used or the cross examination of Mr. Poklitar when he was on the stand and was put on the stand to introduce CBS' massive music survey.

THE COURT: Without prejudice to the discussion of this larger question that you raised and if it was used and will illuminate the examination, I'll receive it solely so I know what he was being questioned about.

MR. HRUSKA: I would like to go back to the examination and check it because I don't know whether this was offered when Mr. Poklitar was on the stand and was fresh in our minds.

I did not realize that this was being offered because it had been shown to Mr. Poklitar during his examination.

Now that I know that, I'll have an opportunity to

go back to the transcript and see whether there was anything raised regarding that document which indicates that it should not be admissible.

THE COURT: I am going to rule that it is admitted subject to your bringing to my attention some reason why it should be stricken, so that I don't have have to rule again.

MR. TOPKIS: 228, this is a background document to show your Honor how the music clearance section of CBS and ASCAP work together on a program, again as a matter of mechanics, so you can have the story before you, if there is any need for it. I am not sure that there will be but I can't see that it will hurt to have it, if we need it.

MR. BRUSKA: Was this used during the Poklitar examination?

MR. TOPKIS: I don't remember.

THE COURT: AX 228 seems to consist of two things, the cue sheets and the letter, is that right?

MR. TOPKIS: Right.

THE COURT: Is the letter significant?

MR. TOPKIS: The letter is a letter from ASCAP to the Music Clearance Section at CBS saying that we are willing to clear the compositions which are annotated on the attached cue sheet.

THE COURT: Just a cover letter.

MR. TOPKIS: That's right. It is just to show you how it is done. That's the only purpose of it.

THE COURT: I would like to know how it is done. I would like to learn something in this case.

MR. TOPKIS: We could probably suggest on both sides positions which should be filled by someone other than

their present incumbents and if you want to apply--

MR. HRUSKA: No doubt.

(AX 228 received in evidence.)

MR. TOPKIS: 229--could we reserve on that, your Honor?

THE COURT: Yes.

MR. TOPKIS: 230 to 238 are all in evidence.

239 is again just part of the history, our blanket network radio license agreement with CBS from 41 to 58.

MR. HRUSKA: 239 was what?

THE COURT: Is the blanket radio network license from ASCAP from '41 to '58.

MR. HRUSKA: Well, I would object, your Honor, on the same grounds that I have been objecting to agreements between ASCAP and any radio station or network as being irrelevant to the case.

THE COURT: I must say I don't know what I am going to learn. I know that there have been such licenses. It is undisputed that for ever and ever everybody's had a blanket license and the question is whether we do something else now or we don't.

I don't see what it adds by putting all these things in.

I have no objection.

MR. TOPKIS: Mr. Gitter reminds us, your Honor, that we agreed to endeavor with Mr. Hruska to try and work out a simple one or two page statement of the facts and we will do that.

MR. HRUSKA: All right.

MR. TOPKIS: So I will not press at this time any of them as to this.

240 to 261 are all standard forms of local television network television--

MR. HRUSKA: We have standard forms attached to the stipulation.

MR. TOPKIS: You have the current ones, not the past ones.

MR. HRUSKA: I think we go back.

THE COURT: In this case what is the difference?

MR. TOPKIS: Only to show that the rates have trended downward steadily on a percentage basis.

MR. HRUSKA: Yes, that's right. These are unsigned documents. These are not even actual contracts.

THE COURT: Can't you reach agreement as to what the rates were during the years in question?

MR. TOPKIS: I believe so.

MR. HRUSKA: I think the rates don't mean anything unless you know the amounts. If the argument is going to be

made that ASCAP is losing power or has no power because its reduced a rate from 4 per cent to 3 per cent, it is meaningless unless you know whether or not the reduction from 4 per cent to 3 per cent nevertheless generated 50 per cent more revenues.

MR. TOPKIS: It is not meaningless. It is the adversary system. I put in the percentage and then he puts in the dollars.

MR. HRUSKA: But we can't get the figure, your Honor, that's the point. You can't find the figure here.

Mr. Topkis is talking about industry wide contracts. We don't know what the industry wide payments have been.

ASCAP knows that. That's not public information.

MR. TOPKIS: Really I don't care about anything so far as dollars are concerned except CBS--

MR. HRUSKA: Doesn't help you, that's why.

MR. TOPKIS: There is no question that the dollars have gone up until we went on a flat dollar basis a few years ago. Equally, I think there is no question that the percentage rates have steadily gone down.

MR. HRUSKA: And equally I think it is meaningless that the rates have gone down if the dollars have gone up.

MR. TOPKIS: Well, there are the facts and I think

we have now stated them and if we can stipulate to them, let that be the end of it.

MR. SONDAK: Your Honor, if we are going to make this table that Mr. Topkis has suggested, which will have the rates and dollars for all the CBS radio stations, television stations and whatever, doesn't that signify everybody and all these other documents are really unnecessary.

MR. TOPKIS: Yes, I think Mr. Sondak is quite correct, your Honor.

I would just add that I--we have had and this is to demonstrate our extraordinary adaptability to changing circumstances--we have had special licenses formulated for all news programs so we now offer not only per program and blanket but an all news variant and if Mr. Hruska will stipulate with me that we are an extraordinarily adaptable institution, I will not press that.

MR. HRUSKA: This is a form of license offered to a radio station that makes no feature performances of music or really anything other than jingles, talk or news--

THE COURT: Like CBS?

MR. TOPKIS: Yes.

MR. HRUSKA: Correct.

I think this whole area is going to generate a lot of work for ourselves. I would have no problem in stipula-

thing that over a period of 30 years, is it, there has been some reduction in the rate charged, rate percentage charged by ASCAP to radio stations and radio networks and that there has been an increase over these years in the total dollars paid and that really is--if they think that is a relevant point, let's have a stipulation on it.

MR. TOPKIS: Until we went on the flat dollar basis with the networks, that's true.

THE COURT: All right. I am satisfied if the parties are satisfied on that basis.

Do we all understand each other now?

MR. KRUSKA: Except I have just been informed that when ASCAP went on a flat dollar basis the revenues went up.

MR. GREEN: The flat dollar basis with CBS began in '66 or earlier. The agreement was reached in '66 and the rates then, the flat dollar rates--

THE COURT: Was higher than the previous rate, is that it?

MR. GREEN: And they kept going up.

MR. KRUSKA: This is radio?

MR. GREEN: This is television.

MR. TOPKIS: We are talking across the board and Dick is right except that my reference was as to the fact that starting with 1969 when the deal was actually made,

jbe 7

although it was retroactive to '66, starting with '69 our rates have stayed flat dollarwise.

MR. GREEN: I would only say that the deal wasn't made in '69 but it was reduced to writing in '69. It was made in '66.

MR. TOPKIS: Agreed.

THE COURT: Do you gentlemen know what you have agreed to do now?

Because it is not entirely clear to me.

MR. HRUSKA: I don't think the record is entirely clear either, your Honor. Perhaps the best way to do this is for us to draft a stipulation which can be maybe two sentences to cover this point and submit it as soon as we can. I don't think there is a basic disagreement here.

MR. TOPKIS: You and I will work it out personally over the telephone.

THE COURT: So that the offer of those exhibits is withdrawn pending the expected submission of the stipulation.

MR. TOPKIS: Very good, your Honor.

Now, 262 is the latest CBS report. I think it shows nothing other than that CBS continues on an ever ascending note of triumph. I can't say that that is indispensible and I will withdraw it for the present.

263 and 264 and all their parts have been received

in evidence.

THE COURT: Very good.

MR. TOPKIS: 265, I don't know what that is.

THE COURT: An agreement between CBS news and Charles Gross.

MR. HRUSKA: I don't think we have any objection to this.

xx (AX 265 is received in evidence.)

MR. TOPKIS: 266.

MR. HRUSKA: No objection.

xx (AX 266 received in evidence.)

MR. TOPKIS: 267.

MR. HRUSKA: No objection.

xx (AX 267 received in evidence.)

MR. HRUSKA: No objection to 268 either.

xx (AX 268 received in evidence.)

MR. TOPKIS: 269 is a statement of the distributions received by April and Blackwood from ASCAP and BMI relating to the years '68 and '72 and it is agreed that that material will be treated confidentially.

MR. HRUSKA: I would like to hear, your Honor, how these figures are relevant.

THE COURT: What do you expect to argue on the basis of the figures.

MR. TOPKIS: That April and Blackwood are significant sources of revenue for CBS; that they have been growing sources of revenue for CBS and that it may therefore be suggested that ASCAP and BMI serve the corporate purpose of CBS and, finally, that to a degree at least CBS has what I think it would clearly join in calling a polling of music available to it.

MR. HRUSKA: We have the catalogues of April and Blackwood in evidence already.

THE COURT: I am aware of the fact that CBS owns April and Blackwood and that they have whatever music those organizations have. I don't know why I need a letter about how much money they received.

MR. TOPKIS: It is not critically important, your Honor. I thought you might want to know the figures. That's really all it comes down to.

THE COURT: I don't think it would make much difference to me.

MR. TOPKIS: Then I will not press it.

270 we are going to try to work out something on. That is the question of the CTN inventory in the can and I'll hold the offer of that pending our attempt at getting somewhere on that subject.

bb-1

THE COURT: That is the size and scope business?

MR. TOPKIS: Right. That is what Mr. Gitter and Mr. Baker, I think, are going to inquire to.

THE COURT: Right.

MR. TOPKIS: 271 through 279 are copies of the special, of the reports of the special distribution advisers appointed by Judge Ryan to supervise and report to him on the distributionof ASCAP royalties.

THE COURT: What is the subject matter of their reports?

Is it the same in all instances?

MR. TOPKIS: The difficulties that are annually encountered and, by diligent application, overcome and the purpose of them --

MR. HRUSKA: I object to them.

MR. TOPKIS: The purpose of them is to suggest to your Honor is that ASCAP's distribution scheme is an extremely complex and much argued over scheme of distribution and that in consequence, tinkering with it at the suggestion of CBS is something that should not be done lightly.

MR. HRUSKA: Your Honor, I don't think these documents prove that and we have the distribution scheme --

THE COURT: I would be prepared to believe, subject to hearing why I shouldn't from Mr. Hruska that

the ASCAP distribution scheme can be described in good faith as being complicated although the definition of the word complicated would then come in but it doesn't seem to me it is a question of tinkering with it. I mean that is not what I would describe CBS is asking to do.

They are asking to replace it.

MR. TOPKIS: Only to a degree, only insofar as they are concerned and possibly two other television networks and my point is that this is kind of like a building which is made up of lots of girders and cement.

THE COURT: You are trying to show me what the effect of my granting the relief requested would be?

MR. TOPKIS: That's right.

THE COURT: And you believe these reports would illuminate that subject by letting me know what the situation is that I am being asked to alter.

MR. BAKER: The description of that system is in evidence. There has been testimony on that system. Its complexity or non-complexity is best described by the formula which sets it out.

THE COURT: How is the formula in evidence?

MR. BAKER: As an exhibit to the stipulation. And there are statements by people who have never been here

bb-3

in court. We don't know what the foundation for the statements they make is.

If there are a lot of disputes about the distribution system, then let's hear from somebody about those disputes.

THE COURT: I am reluctant to accept this kind of material which in the first instance I expressed my views about when Mr. Hruska wanted to put in material relating to statements by Mr. Finkelstein and so on.

I generically described such material as being material prepared for purposes of other than that which is before me at the moment, which I think is not very dependable evidence because you never know what the person making the report may have said if he had been asked the questions that are before me at the moment.

If the facts relating to the distribution system, the objective facts are before me at the moment, I think you better argue from that.

MR. TOPKIS: They are not, your Honor. The distribution system is before you, that is true, but the finy intricacies of it I do not believe are.

For example, this first report speaks of the limit of 9.6 future performance credits being applied to

bb-4

compositions performed during half time programs on NCAA football games and there are ten pages or six pages of discussion over whether or not that should be done.

MR. HRUSKA: We had two days of testimony from Mr. Marks on the distribution system.

MR. TOPKIS: I know it.

MR. HRUSKA: And on its alleged complexities or actual complexities and disputes that arose and Mr. Marks' views as to why what you describe as tinkering would be unfortunate, etc., etc.

We are dealing here with a flock of these reports which contain all kinds of statements by ASCAP members who we have had no opportunity to cross-examine or even to talk to. We don't know the basis for any of the statements they make.

We are completely prevented from doing anything at all with respect to these documents as a practical matter. If they were to go in evidence -- your Honor, this seems to me the unfairest --

THE COURT: I am very reluctant -- I think Mr. Bruska is saying in a somewhat different way what I said before. I am reluctant to receive the documents without having a witness to explain what is meant by what is contained in them.

If you feel that at this stage of the game it is necessary for me to have that information because I think that in a case of this kind it is important from the public's point of view that I have all the information I should have, I would be willing to hear more witnesses on it or I would be -- I think you are free to argue the general proposition at this time, Mr. Topkis, and should my ruling be adverse to ASCAP I would commit myself at this time obviously not to take any -- there are many steps left in the litigation, even if I should make an adverse ruling -- to leave the -- leave for further proof the significance of these esoteric details, by which I don't mean to minimize their importance, and the extent to which they should prevent any relief at that time, but I am just not willing to accept the reports themselves and to act on the basis of them without any explanation or any opportunity to other counsel to bring out facts which might be brought out in the light of this case, but which would necessarily even thought of at the time that the reports were issued.

MR. TOPKIS: Could I have one final try and I will make it brief?

What is proposed here is that a whole new system of governments of music rights licensing shall be substituted for the present system.

bb-5

I offer these reports to show to you that the present system is a functioning, much discussed, much considered operation which has many details and subtleties and all we have in opposition to it is a hypothetical universe.

Now, the only time I can remember in recorded history that a bunch of wise men sat down and supplanted an existing government with a new hypothesis was in Philadelphia in 1789, and then they had 150 years of thinking going for them as a basis for what they did and it also required amendments, but leave that aside, this has the very great --

THE COURT: It has lasted a long time.

MR. TOPKIS: It has, but it is the one time it ever did.

THE COURT: It is awfully creepy sometimes.

MR. TOPKIS: I think we are all grateful it is around.

The difference between what is reflected in these documents and what we have been hearing in the courtroom is the difference between actual fact and what is going on today and has been for years and various people's speculations, and I think you might benefit from reading one of the reports.

THE COURT: I don't necessarily disagree with your rationale. I am talking about a specific offer of evidence and I am concerned about the ex parte aspect of the documents and the fact that they were prepared for situations totally unrelated to this case.

I have already said that as one of the alternatives I would be willing to hear further evidence on this question, if you consider it of such sufficient importance.

I also don't contest in my own mind that this is a functioning system, that there has been a lot of thought. There simply can't be any dispute about that and Mr. Hruska shakes his head in agreement.

You are free to argue those points. If you believe that the degree of complexity is something that is not clear in the record and that it is a significant fact, I am willing to hear further evidence on it, but I am not willing to receive the report without a witness. Or the reports. I don't think you need them, but if you think you need them, I am willing to do that.

MR. TOPKIS: There is no point, surely, in my calling either Mr. Olney or Mr. Kaplan, both of whom are appointed officers of this Court to authenticate the reports and there are no statements of fact in any report on which

I rely.

THE COURT: I am not talking about authenticating the report. I don't think anybody doubts the authenticity of them. I am talking about giving CBS an opportunity to ask those people questions if they want to. If they believe there is something that I ought to know that is not clear from the reports, they will be given the opportunity to ask the questions and I will know the answers.

MR. TOPKIS: I don't care about -- and I don't think CBS cares about the questions and answers because I am not offering these as proof of any fact. I don't suggest there is any admission in there, that there is any fact other than the proof that there is a functioning,detailed, concerted operation going now.

THE COURT: I take judicial notice of that.

MR. TOPKIS: I suppose you would have to. These are filed documents in this courthouse.

THE COURT: I take judicial notice of that general proposition.

MR. TOPKIS: Then we can reserve it for further general discussion, if need be.

We withdraw 280 and 281.

282, 283, 284 and 284 are listed of our 50 top earning publishers for the years '63, '64, '65 and '66, which

I think will be helpful to your Honor in indicating where the people involved in the 3M incident stood at that time.

THE COURT: What is the problem with that?

MR. HRUSKA: This is the first time --

MR. TOPKIS: Didn't you offer these, as a matter of fact?

MR. HRUSKA: No. As a matter of fact, these documents have a rather curious history. We sought this information during pretrial discovery and our Rule 34 motion had covered -- our request had covered this information and ASCAP objected to it on the grounds of irrelevance, they refused to give it to us. It was one of those open matters on which we had the ground rule concerning documents as to which our requests were upheld and -- I can't remember the exact wording of it -- but this was left in abeyance, but ASCAP did not produce it to us.

What we did receive from ASCAP for the year '67, I think, through the years six months of 1972, was information of a similar nature regarding 14 top publisher groups and the contentions there featured the point by ASCAP that they could not readily in their system, without enormous burden, pull together information on other than those 14 publisher groups.

Now suddenly we receive information on 50 publishers for these back years.

I don't really at the moment understand the basis for the offer. I must say I am concerned about it because of the back history and our great efforts to get this information in discovery, so that prior to the trial we might analyze this data and do something with it but -- and the failure of ASCAP to give it to us indicates perhaps a technical ground for objection, but I think we ought to hear more about the relevance.

And how they were put together would be an interesting subject also in view of the fact that when we made requests for information like this, we were informed that it could not be put together.

We know how much we distribute to each of our publishers annually. They were just graded in order of receipts.

MR. HRUSKA: The problem was related by Mr. Belnick principally. Unfortunately he is not here. It was not in coming up with actual distribution figures for separate publishing corporate entities but for grouping these entities into publishing groups.

Here I gather they are grouped as publisher groups.

Another objection that is obvious in the face of these documents is a statement here, for example, the top line, "Warner Bros. Group."

We don't know what Warner Bros. Group consists of. The Chapel Group --

MR. TOPKIS: I think you do. Forgive me for interrupting. There have been documentation of the families of groups and so on.

MR. HRUSKA: In the top 14, I probably misspoke as to Warner Bros. You did supply us with a list of company names for the top 14. Below the top 14 we simply --

THE COURT: That should be easy to remedy if that were the sticky point.

MR. TOPKIS: Sure.

THE COURT: I can admit them subject to your being advised of who the groups are.

MR. HRUSKA: What is the relevance? You said something about 3M.

MR. TOPKIS: Certainly. I don't think I have to dwell on that, do I?

THE COURT: I think I understand it. You want me to know among those who did and didn't enter the 3M situation where they stood in the industry?

MR. TOPKIS: Exactly. And so far as this matter of groups is concerned, Mr. Collins' letter lists all the groups.

MR. HRUSKA: Mr. Collins' letter lists all the groups?

MR. TOPKIS: Sure. There is no mystery about the groups. If there is anyone that CBS is uncertain about, we will be glad to identify it.

MR. BAKER: Could I inquire whether we have information as to the earnings of publishers who did not deal or who did who are below the top 50 groups for purposes of comparison?

MR. TOPKIS: I don't understand.

THE COURT: You mean all the rest of the publishers?

MR. BAKER: He said this was to show the relative size of the publishers involved in the 3M affair.

Does this list all of the publishers involved in the 3M affair?

MR. TOPPIS: It lists the top 50 publishers --

MR. BAKER: To the extent there are very small publishers, it does not list them.

THE COURT: I don't know what you gentlemen mean when you use the world "involved."

MR. BAKER: Either made a request or made a deal.

THE COURT: If they made a deal they obviously made a request.

Is that what you both mean?

Is that what you mean?

MR. TOPPIS: Certainly.

THE COURT: In answer to Mr.Baker, the question then arises apparently whether there are a lot of publishers to whom 3M made such a request who would not be included in the 50.

Does anybody know whether that is a significant factor or not?

MR. HRUSKA: I think most of the publishers

who did deal with 3M were relatively small publishers.

MR. TOPKIS: Then my friends are helped. This tells them, for example, the bottom figure on 1963 is a publisher whose distributions from us were under $30,000 for that year.

MR. HRUSKA: In view of the fact --

THE COURT: Of the 50?

MR. TOPKIS: Yes.

MR. HRUSKA: In view of the fact, your Honor, that we had requested information of this nature in pretrial discovery and in view of the ground for the offer, the ground of relevance, could we have an understanding that we would get the figures for each of the publishers who did deal with 3M to the extent that those publishers do not appear on that list, and the publishers who did not deal to the extent they don't appear on the list, although I believe all of the nine publishers who did not deal are on this list because they are easily within the top 50? I think, in fact, of the nine within the top 14 groups. The only omission of the top 14 was the Irving Berlin Company, which I think is close to the top 14. And also a list to the extent these publishers are groups, a list of the independant entity components of those groups, so we have some --

THE COURT: Do you use the word independent in any particular sense?

Do you mean separate?

MR. HRUSKA: Separate, rather than independent. Obviously they are not independent, they are part of a related group.

MR. BAKER: As of the point in time in which those documents speak.

MR. HRUSKA: Right.

MR. TOPKIS: Your Honor, look, discovery has to stop at some point. Litigation has to stop at some point. Sometimes you win, sometimes you lose, but the basic rule is sometimes you stop complaining. Can't we have an end to discovery here?

MR. HRUSKA: The point --

MR. TOPKIS: It is either relevant or irrelevant.

THE COURT: I don't understand what the significance of the breakdown of the groups is?

MR. TOPKIS: They have all the groups. There isn't a group listed here which Mr. Barclay hasn't listed in his letter, I don't believe.

MR. COLLINS: Those are only lists of publishers who supply information. That is not a complete list.

MR. TOPKIS: What difference does it make?

MR. HRUSKA: It doesn't go to the years.

THE COURT: What is the significance?

MR. HRUSKA: What has happened here, we made a comprehensive request so we could get all the information. ASCAP succeeded in, for lack of a better word, frustrating that request.

We won this point before Magistrate Raby.

MR. TOPKIS: Then you have no complaint.

MR. HRUSKA: We entered into that ground rule as your Honor may recall, in your Honor's chambers, regarding those documents. But the point is, having frustrated the attempt to get at all the information, ASCAP now comes forward with part of the information and says we can't have the remainder of the information to make a real analysis of the situation.

THE COURT: I am not saying that at the moment. I am asking you what is the significance of the remainder of the information that you would like.

MR. HRUSKA: Right. The analysis of the 3M situation, your Honor, is dependent to some significant extent on the nature of the publishers who dealt and the nature of the publishers who did not deal. In other words, if it can be shown that by and large the really major publishers

refused to deal and that by and large the publishers who did deal relatively small and relatively insignificant, that gives meaning to the 3M incident which it might not have absent that information.

MR. TOPKIS: That is exactly what this list gives. If a publisher who got less than --

THE COURT: Let's take an example. Do you want to take an example from the list and tell me what you mean, what breakdown you would need?

MR. HRUSKA: Right. Let's say there is a publisher X -- I don't remember the name. Publisher X did deal with 3M. Publisher X, let's say, is a very small publisher and one of the publishers who did deal.

When ASCAP comes back and argues the 3M incident doesn't mean anything because ten publishers did deal,--

THE COURT: Let me ask this: Does anybody have a feel for the approximate number of publishers who did deal with 3M that might be on that list?

MR. BLUMSTEIN: May I see it? Who did deal?

THE COURT: Who did deal.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: I will admit the lists, and that refers to AX282 through 285, subject to ASCAP furnishing CBS,

BMI, with a list of the publishers not included on the list who did deal with 3M.

And I guess the ASCAP distribution of those publishers for the same period as the period specified in the list.

MR. TOPKIS: Right.

THE COURT: Or lists.

MR. TOPKIS: We then come to 286, your Honor, which is a computer printout from the ASCAP survey of CBS Television Network feature performances of music during the first quarter of music.

THE COURT: What is the objection to that?

MR. HRUSKA: I am sorry, your Honor, I was conferring with Mr. Baker about these figures. I am wondering whether there is some way -- we don't have any backup for this information, your Honor.

THE COURT: Let me see it.

MR. HRUSKA: These are just figures on a sheet.

THE COURT: Are you in a position to make any representation as to what the source and meaning of these figures is?

MR. TOPKIS: They were supplied to us by ASCAP. They probably contain errors and they are generally, I

would speculate, right.

THE COURT: As what, the total amount received from ASCAP by this group in the year indicated at the top of the sheet?

MR. TOPKIS: Right, your Honor.

THE COURT: I don't understand why we need to go into the makeup of these figures in any detail unless you can bring to my attention any reason to doubt that they are substantially correct and that they indicate the standing of the groups and the order indicated, the distributions are --

MR. HRUSKA: I don't want to be difficult --

THE COURT: -- in the scope and magnitude indicated.

MR. HRUSKA: As far as I know, all I can see, it is a pig in a poke. There are numbers on a page. There is a way to check this.

THE COURT: Certainly there is a way to check it, of course.

MR HRUSKA: The way to check it is very simple. These are presumably machine-generated figures. They would have to be. That means they come from computer tapes.

MR. TOPKIS: Look, your Honor --

THE COURT: I don't understand what you want to have done about them or why you are worried about them. It says Shapiro, Bernstein group, X dollars. If that were

25 per cent less, would it affect the argument here either way?

MR. HRUSKA: I have very little doubt that Shapiro, Bernstein was in and around that figure give or take $200,000. I suppose it is just my basic reluctance to accept without any --

THE COURT: I understand your reluctance where the accuracy of the figures would make some difference in substance as to the conclusions which might be drawn from the proposed argument. I don't see that that would happen.

MR. HRUSKA: I guess my problem right now, your Honor -- I don't know because I haven't had an opportunity to analyze those figures in any data analysis way, what arguments might be made.

THE COURT: Let me dispose of it now by admitting them subject to your right to request first backup material on a showing that that backup material is necessary to protect your interests.

MR. HRUSKA: I think that is a fine resolution.

MR. TOPKIS: Your Honor, we now come to 286 and 287, which are computer printouts of our feature performances and all performances of music on CBS Television Network during the first quarter of 1972.

They came from our data processing records.

We put in the question and these are the printout answers. I am sure we don't have the backup data. The backup data is up at Lincoln Center. Our friends have had all the opportunity in the world to check it.

Doubtless there are mistakes here, too. They are as reliable as human fallibility permits.

MR.BAKER: Your Honor, we received that document the last business day before trial. We had previously received another computer study, your Honor, which in part covered the same period on April 13. We requested backup on May 30 and we didn't even get the tapes on the earlier study until the second day of trial. The statement that we have had an adequate opportunity to check those is absolute nonsense. We have spent what time we had during trial checking on the first study and we have had no opportunity to check the second study. The description of the methodology by which that study was prepared is almost incomprehensible.

MR. TOPKIS: What is the methodology which is the only question I think we need comment on?

The methodology is you ask your computer what feature performances did you record during the first quarter of 1972, and your computer answers you, here they are.

MR. BAKER: Why is the data different between the two studies for the same period of time?

THE COURT: Who is in charge of doing this at ASCAP?

MR. BLUMSTEIN: Mr. McLaughlin, who is head of the Data Processing.

THE COURT: I take it we all agree that the Court ought to have some solid information as to what music was used by CBS for a relevant period in question.

I assume unless I hear anything to the contrary that the first quarter of 1972 is as good a period for informing me as any other.

MR. HRUSKA: Let me state something to the contrary right away on that, your Honor.

THE COURT: All right.

MR. HRUSKA: I don't agree with that. I think probably the first quarter of 1970 is far more--

MR. TOPKIS: The period they used-

MR. HRUSKA: We used both the first quarter of '70--

THE COURT: Do you have 1970 in?

MR. HRUSKA: We have a far more limited study, your Honor. We don't have this information in the regular course of our business on computer tapes. As you may recall, we put on a witness to explain how our study was prepared, our more limited study, more limited in view of the fact that we had to start from scratch.

That study which pertained both to the first quarter of 1970 and the first quarter of 1972 was received in evidence.

MR. BAKER: And they had previously deposed that witness on that study.

THE COURT: I don't think what you have just said is inconsistent.

MR. GITTER: That is not true.

THE COURT: What's not true?

MR. GITTER: That we have previously deposed that witness on that study.

THE COURT: In any event, I don't find what you have just said to be inconsistent with the relevance of the first quarter of 1972. You are telling me there's another period as well which should be considered.

MR. HRUSKA: Right.

THE COURT: Nobody is objecting to that.

MR. BAKER: Your Honor, I would simply point out

that if this study is offered on the question of whether CBS should have undertaken to bypass ASCAP instead of bringing this lawsuit, then I would suggest that the iformation concerning music useage at or about that time, namely 1970, the beginning of 1970, should be far more important than 1972.

THE COURT: I don't understand why. Nothing that I'm saying at the moment prevents you from making that argument.

The question and the only question that I see that remains is whether you have had a fair opportunity to satisfy yourself of the dependability of this information.

I do agree with Mr. Baker, if CBS received this information only the night before or even a week before trial that that is not adequate opportunity. I am, therefore, willing to receive this information after Mr. Baker has had an opportunity or whoever you want to confer with Mr. McLaughlin and get whatever information you need to satisfy or dissatisfy yourself about it.

If you are unsatisfied, I will have to meet with you again and consider the matter further.

That's it.

MR. TOPKIS: Your Honor will recall we offered to make Mr. McLaughlin available a week ago. We are completely in accord with your Honor's ruling.

THE COURT: All right. I am not saying you didn't or you did offer to. I am saying they ought to be given a reasonable opportunity thereafter to check this out.

MR. HRUSKA: I might also point out, your Honor, that these studies bear dates of June and July of this year, and, as I say, that second study being given to us the day before Thanksgiving I think is an extraordinary act.

THE COURT: I have already expressed my unhappiness about the fact that some of this stuff was handed in very late.

MR. HRUSKA: I understand.

THE COURT: I have also indicated that I can't let that stand in the way of the Court having the information it needs.

MR. HRUSKA: Do we have the types on that second study?

MR. BAKER: We have one of the tapes from the second study. I assume that ASCAP is willing to stipulate that Magistrate Raby's ruling concerning other types applies to the second study as well as the first study.

MR. TOPKIS: That is to say, you pay for them, you get them, absolutely.

MR. BAKER: That was not his ruling.

THE COURT: Whatever his ruling was, it seems to

me it should apply.

MR. TOPKIS: Right. Now, your Honor--

MR. GITTER: Are these two admitted subject to Mr. Baker's--

MR. HRUSKA: No.

THE COURT: I will be prepared to admit them at such time as I rule that CBS has been given an adequate opportunity to check on the backup material and that if there are any disputes arising from that checkup, I have ruled on those disputes.

MR. BAKER: Just to make it clear--

THE COURT: I do intend sooner or later to get this kind of material into the record--

MR. BAKER: You said to check on the backup material. I assume that also includes the manner in which the information was prepared.

MR. TOPKIS: Mr. McLaughlin will answer any questions. Could we just agree that no more than two days of his time will be devoted to your question?

MR. BAKER: If he can answer them, that's fine.

MR. TOPKIS: That is an unfair condition.

MR. BAKER: I sent you a series of questions in May which I don't think Mr. McLaughlin can answer.

I am sure there will be somebody else that can.

gawe 6

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Where are we?

MR. TOPKIS: We are up to 288. I think I am on the verge of withdrawing it in deference to your Honor's prior rulings.

THE COURT: The same thing for 289?

MR. TOPKIS: We do not offer.

290 is received.

THE COURT: I have three more numbers written in here.

MR. TOPKIS: Yes.

They are in already, your Honor.

THE COURT: Does BMI have anything of this sort?

I know you have the subpoena question with Mr. Hruska.

MISS KEARSE: Mr. Davidson, will speak to our documents. I assume you want to finish with the ASCAP first?

MR. BLUMSTEIN: Should we finish the 3M documents first, your Honor?

THE COURT: I need a list of those.

MR. BLUMSTEIN: I don't think we have a list.

MR. BAKER: I can give you a pile of documents,

your Honor.

THE COURT: No, that's all right. Just go ahead and tell me what the story is.

MR. BLUMSTEIN: 193.

MR. BAKER: No objection.

MR. BLUMSTEIN: 194, no objection. 195, I think the transcript has been corrected, Mr. Baker, so there's no objection.

MR. BAKER: That's right.

MR. BLUMSTEIN: 196 is already in as 3M. PX 56.

MR. BAKER: We need a transcript correction on that as well. I assume it's been made.

MR. BLUMSTEIN: 179 is the first one as to which there is a problem.

MR. DAVIDSON: As it appears, your Honor, we have a list of the ASCAP documents.

THE COURT: I just received it. What is the problem on 179?

MR. BAKER: As you will recall, your Honor, these documents came in fairly rapidly and Mr. Arrow identified them. I said I would not object if the contracts were complete and signed, and the document is incomplete in the sense it does not indicate the number of works.

There is a schedule A of works that is covered by the contract which is not attached thereto. At the time I notified ASCAP of my objection on this ground I suggested to them that if they could simply get an affidavit from Mr. Arrow associating the number of works with each contract, I would withdraw my objection where it was on that basis.

MR. BLUMSTEIN: Your Honor, 197 is a document that was produced by Mr. Arrow in response to a subpoena we served on him for his 3M files, his contracts. It appears to be an agreement between Brandom Music Company and 3M.

We offer it for one very simple proposition. Brandom Music Company entered into an agreement with 3M. Mr. Arrow so testified. Where the schedule is, I have no idea. I don't know what difference it makes. It has nothing to do with the purpose for which we are offering the document. If Mr. Baker thinks it relevant, let him find Schedule A.

THE COURT: If it is offered for the limited purpose--I think CBS of course, will be free to comment to the Court. The Court has no way of knowing whether this is for a large or small number of compositions.

It may have less meaning than it would have if there was alist attached to it.

I think you are entitled to prove there was a contract.

MR. BLUMSTEIN: Mr. Arrow so testified.

MR. BAKER: That's right. Mr. Arrow so testified.

THE COURT: I don't know what the contract adds to his testimony.

MR. BAKER: My objection is along the same lines as a discussion we had earlier with respect to listing of publishers. Some publishers are more significant than other publishers.

THE COURT: I understand the nature of your objection. I agree with your rationale. I don't think that prevents the exhibit necessarily from being admitted. It certainly limits its meaning. Frankly, although I suppose it may be an orderly way to do it, if you are offering a document which simply confirms what the undisputed testimony is anyway, I don't know that it adds anything to the proof or to the record.

I will admit it for the purpose of showing that, indeed, there was a contract.

MR. BLUMSTEIN: 198, same problem.

MR. BAKER: Same problem. I assume the same ruling.

THE COURT: Question.

MR. BLUMSTEIN: 199.

MR. BAKER: It is unexecuted, isn't it?

MR. BLUMSTEIN: I think you are right. The copy that Mr. Arrow produced is unexecuted. He was shown this agreement and he said it was a copy of a contract that he had.

THE COURT: If the witness testified that it was a copy of the contract which was entered into, I don't think you need to produce a signed copy.

On the other hand, I feel as I did with Brandom and Chipdale, I don't see what it adds.

MR. BAKER: Your Honor--

THE COURT: You are free to argue they entered into a contract and you are free to argue that on the basis of what he said.

MR. BAKER: These documents were put in rapidly. The witness also testified that the contracts were on their face for the M2100 agreement, were for the M700 agreement, and--

THE COURT: Putting his signature on wouldn't clarify that point.

MR. HRUSKA: The point is, your Honor--

THE COURT: Are you asking me to strike his testi-

gawe ll

mony?

MR. BAKER: No, sir. I'm saying I don't think that this contract establishes that there was such an agreement.

MR. BLUMSTEIN: The document itself is not executed.

THE COURT: Gentlemen, it seems to me on this point we are quibbling about nothing. Here is a witness who testified and who knows more about it than anybody who is here and perhaps more about it than anyone else that there were such agreements in effect.

He did not withdraw that statement on cross examination as far as I recall. It seems to me I'm bound by that testimony unless there's some reason to doubt it. I haven't heard of any. I don't see why we should argue either way about whether they go in or they don't go in.

I have already said about five times I don't think they add anything to his testimony. Neither do I think that CBS' argument is very effective, that there is some questions whether the agreements were entered into when there is no evidence they weren't and there is evidence they were.

MR. BLUMSTEIN: Well, may I say, your Honor, we have already offered these documents when Mr. Arrow was on the stand.

We are not reoffering them now. These are CBS' objections to them.

THE COURT: I understand. CBS' objections are overruled but I will repeat and for the last time, the documents are received merely for the purpose of establishing that there was a contract which has already been testified to.

MR. HRUSKA: Do I understand that to mean, your Honor, there are not for the purpose of indicating that those blank and unexecuted forms represented the actual contract that was entered into.

THE COURT: No. To the extent that the witness testified that they were the contracts entered into, I'll believe that.

MR. HRUSKA: Unless there is grounds in the record for not believing it. Such as the witness' mistake with respect to other contracts.

THE COURT: You are free to argue from anything that is in the record.

MR. BLUMSTEIN: We will withdraw that, your Honor.

201 and 202 I think no objection, Mr. Baker.

MR. BAKER: That's correct.

MR. BLUMSTEIN: 203--

MR. BAKER: This is the same problem--that there is no number of works indicated in the contract.

THE COURT: Same ruling.

MR. BLUMSTEIN: 204 no objection.

205, I think the same problem.

MR. BAKER: Yes.

THE COURT: Same ruling.

MR. BLUMSTEIN: 206 and 207, no objection.

208 the same problem.

THE COURT: Is that correct?

MR. BAKER: Yes.

THE COURT: Same ruling.

MR. BLUMSTEIN: 209, 210, 211, no objection.

MR. BAKER: 212--

MR. BLUMSTEIN: As to 212, we can represent that Ray Music was an ASCAP publisher.

MR. BAKER: All right.

THE COURT: So, there is no objection.

MR. BAKER: It is the same objection, the number of songs is not indicated.

THE COURT: Same ruling.

MR. BLUMSTEIN: 213, 214, 215, no objection.

216 I think is the same problem as before.

THE COURT: Same ruling.

MR. BLUMSTEIN: 217, no objection.

There is no 218, so far as I can determine.

MR. BAKER: I don't have one on my list either.

MR. BLUMSTEIN: 219 I think is the same problem as before.

THE COURT: Same ruling.

MR. BLUMSTEIN: 220 and 221 we will withdraw and 222 and 223 no objection.

MR. BAKER: Right.

THE COURT: Very good.

(BX 201 to 217 and 219 and 222, 223 received in evidence.)

xx

MR. TOPKIS: Mr. Blumstein persuades me that we should withdraw 229.

MR. DAVIDSON: BMI has cut its document offers to the bone.

We only have a half dozen documents in addition to the music logs that were referred to before.

I think the music logs which are BX 1 through 10 and BX 12 through 16 could be offered as a group.

Each of these documents was marked during the pre-

trial examination of Mr. Poklitar and they are illustrations of types of situations which occur in the operations of the Music Clearance Department.

They show ranges of situations in which CBS has engaged in direct licensing, examples of inaccuracies in the reports and examples of performances of music which have not been cleared.

As I recall, the bulk of them--

THE COURT: They would be offered for purposes of indicating problems that would arise under the proposed new system or what?

MR. DAVIDSON: MEssentially, the types of problems which are unencountered now, the kind of information which is available to CBS now and that kind of thing.

Mr. Hruska has contended that the operations of this department would be sharply different under a per use system and he refers to it as a mere clerical chore at this time.

As a matter of fact, under the licenses with both BMI and ASCAP there is a contractual obligation to submit music clearance information at the present time and I don't see, really, the distinction between the current system and a per use system as regards music clearance information.

I do submit that the testimony of Mr. Poklitar which is being offered from his pre-trial examination would be much less meaningful without the benefit of these documents.

MR. HRUSKA: We are certainly going to object to the great vast amount of testimony, examination to which both the defendants put Mr. Poklitar on the operations of his music clearance section for the purpose of showing the goofs or what have you that that section has committed over the past 10 years.

BMI obviously combed the music logs for a ten-year or more period.

MR. DAVIDSON: These came from a six-months period and the purpose of the examination was not to demonstrate the goofs of the music clearance department, although they may exist.

The purpose was to show the kinds of information which are available to CBS now, the fact that it does engage in some direct licensing and the ability of it to shift to a per use system the kinds of information that are kept on file and the like.

MR. HRUSKA: I have got a log here back to 1963, which is what made me say ten years.

But the real point here, your Honor, is whether

or not Poklitar, with his two or three clerical assistants--

MR. DAVIDSON: There are nine, Mr. Hruska.

MR. HRUSKA: All right. Then his 9. I don't know if you have ever met them but we are not dealing here with managerial personnel--whether or not those people have committed these ten or fifteen, whatever it is, errors over whatever period of time--

MR. DAVIDSON: They are not errors, Mr. Hruska, and if you would read the documents.

MR. HRUSKA: I didn't interrupt Mr. Davidson while he was talking.

THE COURT: You can reply if you want, Mr. Davidson. Let me hear Mr. Hruska.

MR.HRUSKA: The fact that these people committed the logs, and I use that advisedly, in the past, is not a matter of proof from which any inference can conceivably be drawn that they would commit logs in the future in the same manner or that they even would be the people in the future who would be in charge of doing whatever had to be done to make a per use licensing system work and since I don't believe such an inference can be drawn, I think these documents are early.

THE COURT: I am not prepared to say that such an inference can't be drawn.

You may be correct and I may include that in the future but I am not prepared to say it now.

If this were a jury trial I would say you have just given me a good argument to make to the jury on summation but that doesn't mean they can't go in and I'll accept them for what they are worth.

xx (BX Exhibits 1 through 10 and BX 12 through 16 received in evidence.)

MR. DAVIDSON: The next document I would offer is BX 11, which was also used in the examination of Mr. Poklitar. Actually it is a collection of cards drawn from the card file maintained by CBS' Music Clearance Section which, as I recall Mr. Poklitar's testimony, contained some 300,000 cards containing various information about writers, publishers of music, in some cases indicating addresses, copyright date, and that sort of thing which we believe to be relevant to the question as to whether CBS had the kind of information which it would require in order to institute direct licensing of music.

THE COURT: Is it offered to show the incompleteness of that information or the completeness of it or what?

MR. DAVIDSON: The extent of it and obviously we do not contend that these cards are the entire story. They are just illustrative of the type of thing found in the file.

THE COURT: Are they forms?

MR. DAVIDSON: The cards are not uniform. Some of them are forms--

MR. HRUSKA: How many are there? My file on this exhibit appears to be empty.

MR. DAVIDSON: I believe there are 25 cards.

MR. HRUSKA: Thank you very much.

THE COURT: Can I take a look at the document?

MR. DAVIDSON: Surely.

THE COURT: I think it is worth putting on the record that the first one I look at is called "At the Close of a Long, Long Day."

MR. HRUSKA: Your Honor, I think these documents are totally meaningless and if your Honor wants to augment the record by them, I am not going to have very much objection.

THE COURT: I can't imagine anything I would prefer to do than sit up at Martha's Vineyard next summer and read them but I receive them.

MR. BAKER: I would like to reserve the right to counter-designate portions of Poklitar's testimony which show how this was put together and what they mean.

MR. HRUSKA: The statements that Mr. Davidson made regarding the significance of the documents are probably

refuted very easily--

THE COURT: Let's not argue it, you know. I want to save something for the briefs.

MR. DAVIDSON: The next document I have marked is the BMI consent decree. Of course your Honor can take judicial notice of it and I don't suppose there is any need to burden the record with it.

MR. HRUSKA: Certainly we have no objection.

THE COURT: I would just like to have a clean copy when the time comes.

MR. HRUSKA: Surely. Why don't we put it in? If we are putting in 12 cards out of Poklitar's files, let's put in something significant.

THE COURT: It is received.

MR. DAVIDSON: The consent decree is BX 114.

The next document which I propose to offer was offered yesterday by Mr. Tompkis and he didn't get it in. In other instances in which that was the case I've withdrawn my documents but this one I would like to press for.

This is BX 140.

THE COURT: What is that?

MR. DAVIDSON: It is a memorandum as to the operations of the Music Clearance Department which was prepared by Mr. Poklitar and it was the subject of some of his examina-

tions before trial.

The present interest I have in it is his statement concerning the fact that the Music Clearance Section was absolutely vital to the operations of the network, the television stations, the radio network, radio stations, the records division and so forth, for the purpose of showing that as to writers and publishers whose unwillingness to deal came to the attention of the Music Clearance Department might expect that reputation to extend throughout the CBS empire, rather than possibly being limited to the television network.

THE COURT: Was he questioned on this in his deposition?

MR. DAVIDSON: Yes, and to an extent he tried to walk away, not to unfairly characterize his testimony--

MR. BAKER: Your Honor, I don't recall the testimony per se.

I don't think that he testified to it at any great length. What this memorandum is is a job description which he wrote and I believe that the memorandum speaks both in terms of what he does and what he might do and as long as we have the right to put in whatever testimony there is on the subject, it seems to me that the thing is irrelevant.

It was not written as an official document. It was not written by an officer, not requested, it was not supposed to be a description of what in fact does happen.

THE COURT: On the basis of what Mr. Baker has just suggested but also since I heard nothing that makes me feel that the document has any particular relevance, vis-a-vis BMI as distinct from ASCAP and I ruled on it yesterday, the same ruling today.

(Recess.)

MR. SONDAK: Your Honor, AM 159 and 160 are two documents that are listed in one of their designation lists and each is a one sentence description and I don't have it before me but I took it to be the music study prepared by CBS and offered in the May portion of the trial.

I now discover to my surprise and extreme embarrassment that indeed it was the ASCAP music study given to us in April and needless to say I would not have dreamt of not objecting to it if I had realized that it was the ASCAP music study, rather than ours.

THE COURT: On the same grounds as Mr. Baker's expressed with regard to the 1973 --

MR. BRUSH: Precisely.

MR. POPKIN: On the ground that there hasn't been enough time.

MR. BROWN: This is the point out we received in April, the tapes of which we did not get until Magistrate Raby made a ruling the week before trial or whatever it was.

and we received the second day of trial.

THE COURT: That was the subject of the correspondence? The correspondence I sent you?

MR. HRUSKA: Yes, and we didn't receive the tapes of that until the second day of trial and obviously we haven't had a chance to--

MR. TOPKIS: If it doesn't expand the two days of Mr. McLaughlin's time, my friend can have it.

THE COURT: Then we will dispose of them on the same basis as the 1972 printouts.

Mr. Davidson?

MR. DAVIDSON: The next document which we propose to offer is BX 143 which is a FCC report which when ASCAP offered yesterday your Honor requested that certain portions be designated rather than the entire report being offered.

Last evening we did make some designations and I would like to read them into the record at this time.

MR. HRUSKA: I would object to their being read into the record. I have not seen--

THE COURT: He is not going to read the text but he'll describe them.

MR. HRUSKA: I'm sorry. Excuse me.

MR. DAVIDSON: Page 4, paragraph 6, lines 2 and 3 to page 5, line 9.

Page 10, paragraph 11, first 2 sentences.

Pages 13, paragraph 15, first sentence.

Page 27, paragraph 37, first two sentences.

THE COURT: How did we handle that yesterday? Leave it to you to counter-designate or object or what?

MR. HRUSKA: Certainly to object, your Honor. Obviously I don't know what these refer to and we would have to look at them and I am relatively confident that we would have some objections as to those designations.

THE COURT: All right.

MR. DAVIDSON: Mr. Hruska raised objections to, in general, to the admissibility of the FCC report and order at all.

In support of its inadmissibility we would cite 28 USC Sec. 1733 and Rule 803 (8) of the proposed Federal Rules of Evidence.

MR. HRUSKA: Which have not been adopted.

Tk 4B

bb-1

THE COURT: I know that. They have some weight.

All right. I will have to defer final determination on those exhibits until I hear from Mr. Hruska, which I hope I will soon.

MR. DAVIDSON: May I point out, your Honor, that the designation on Page 13 speaks to a concession by counsel for CBS in his argument before the Commission which possibly might stand in a different status than the other designations.

THE COURT: Do you want to proceed?

MR. DAVIDSON: The next document we wish to offer is BX164, which is a letter from Robert Evans, general counsel of CBS to the Honorable John L. McLellan inhis capacity as chairman of the Patents, Trademarks and Copyrights Committee, subcommittee of the Committee on the Judiciary, and it is dated August 7, 1973.

The specific portion which we are interested in appears on Page 4, in which Mr. EVans expresses CBS's views as to the capability of courts in setting royalty rates which we believe to be inconsistent with the positions taken in this litigation and would offer it for that purpose.

MR. HRUSKA: Let me ask, what paragraph is this?

MR. DAVIDSON: The paragraph beginning "CBS" --

on Page 4 of BX164.

THE COURT: Well, I decline to receive that, even if it is an authorized statement on behalf of CBS. I really think that the question of the feasibility of a court setting rates is one for the Court to decide on the basis of such experience as there is of record already and the experience of the Judge and I don't think that would be of any significant probative value.

MR. HRUSKA: I would like to state very quickly, your Honor, given Mr. DAvidson's description here, that I think the position stated by Mr. EVans in this paragraph is perfectly consistent.

THE COURT: Well, I am disregarding it either way.

MR. DAVIDSON: Finally, your Honor, we would offer a document which I would designate as BX169, which is CBS's answer to the single interrogatory propounded by BMI in this case.

MR. HRUSKA: We have no objection to that.

THE COURT: Very good.

(Exhibits BX 1-16, 114 and 169 were received in evidence.)

THE COURT: Now, what is the story on the subpoena?

MR. DAVIDSON: Your Honor, the first two items of the subpoena call for agreements between CBS Television Network and April Music and Blackwood Music.

During trial Walter Dean, who is the boss of the boss of the manager of April and Blackwood testified that April and Blackwood would be unlikely to deal with CTN if CTN wished to license from April and Blackwood directly music which April and Blackwood had acquired from CTN and I believe that these documents may well indicate that in fact CTN would have the right to perform such works without permission from April and Blackwood and it would thus tend to contradict Mr. DEan's testimony.

Mr. Dean did testify during trial as to the terms of these contracts. I think the best evidence of them is the contracts themselves.

MR. HRUSKA: What Mr.Dean's testimony regarding dealing with CTN in the even of a CTN bypass said or was directed to what Mr. Dean felt would be the attitude of the writers who had affiliated themselves with April and Blackwood Music Publishing Companies and his concern that those writers would be particularly sensitive to such direct dealing precisely because of the relationship between

bb-4

April and Blackwood and CBS.

THE COURT: Well, I can't judge at the moment whether these contracts are going to cast any light on his testimony or be inconsistent with his testimony, but I certainly can't see any harm to anybody. If a protective order is necessary, although I don't know why it would be, that can be put into effect and their being part of the record and counsel being free to argue whatever they want from them.

So, I guess the technical question now is whether you should comply with the subpoena so these items and the ruling is yes.

MR. DAVIDSON: Your Honor, let me skip to Item 4, which is a relatively minor item. In that, we ask for copies of a proposal which Mr.Poklitar discussed in the deposition for in essence computerising the music clearance card file.

I believe that that proposal might well contain cost data which might be inconsistent with the testimony of Messrs. Kaplan and Southworth as to the cost of creating an on-line system for CBS Television Network.

THE COURT: Do you know whether it contains any cost data?

MR. HRUSKA: I believe it does not. I now have seen the document. Am I wrong?

MR. BAKER: I think you are, sir, because Mr. Poklitar testified to something that happened in '69. There was no document prepared on that subject. I did find a document prepared in '67 which was addressed to Mr.Evans who is -- I don't know if he was general counsel or -- he was a lawyer at CBS at that time.

MR. HRUSKA: He was general counsel.

MR. BAKER: It contains no cost data and --

THE COURT: Am I in effect being told that counsel know of no document containing recommendations by Mr. Poklitar along the lines described in Number 4, which contain cost data?

MR. BAKER: Which contain cost data, yes, sir.

THE COURT: If the purpose was solely with regard to cost data, then I will deny the application on the representation of counsel.

MR. DAVIDSON: Presumably, therefore, they would have complied with the subpoena, there being no such document.

THE COURT: All right. Well, pu don't specify --

MR. BAKER: You don't specify the cost data.

MR. HRUSKA: It is not a '67 document.

MR. DAVIDSON: Turning to Item 3, your Honor,

bb-6

during its direct case, CBS introduced some program schedules in effect showing what programs had been broadcast on network.

THE COURT: Yes.

MR. DAVIDSON: What we have in a sense sought in Item 3 is the relevant provisions of those contracts which deal with performing rights to see is CBS taking a risk of copyright infringement if it is unlicensed or is that risk on the producer pursuant to the agreements CBS now has, are there rules under which the producers are obliged to clear songs a certain time in advance with CBS or take the risk of copyright infringement on themselves.

Topics of this kind.

We have one such set of clauses which was presented by CBS on the BMI preliminary injunction motion attached to the affidavit of Mr. Irecht who was with the Ed Sullivan Show at that time.

We inquired into this subject of Mr. Sipes when he testified at trial and he said he didn't know whether the correct materials were typical.

We inquired of Mr. Poklitar at his deposition whether there were rules as to how many days in advance material had to be cleared and he said he didn't know.

This is really a relatively central issue. It relates to many of CBS's contentions, among them putting music in the can and we would very vigorously press this particular item.

MR. HRUSKA: Your Honor, this is, I believe, a classic case of going after a flea with an elephant gun.

The provision that Mr. Davidson has just referred to, it was in the affidavit of Precht, who was the producer of the Ed Sullivan Show, which was submitted in connection with the affidavit of Mr. Dann on the BMI motion for preliminary injunction.

That provision says in substance that in the event that the producer of the program gives a list of songs that the producer wants to use on that program to Mr. Poklitar, the music clearance section, and Mr. Poklitar is unable to clear those songs which is to say he is unable to get ASCAP or BMI to say the songs are in the repertoire and Mr.Poklitar gives notice to the producer that there are no licenses for those songs because they are not in the ASCAP and BMI repertoire, and the producer nevertheless uses the songs without clearing them in some fashion, in that event it is the producer's problem, not CBS's problem.

In other words, CBS is saying to the producer we put you on notice, there is no license, you better get a

license if you want to use that song.

Now, I think that that provision is so meaningless in the context of this case that I think I would be prepared to stipulate that every contract that has ever been signed between CBS and any producer contains that provision. It really has no effect on this case whatsoever.

THE COURT: Well, let's not go into the question of what effect it has.

Will it satisfy your needs if CBS stipulates that that is a typical provision?

MR. DAVIDSON: Well, that would be of some assistance, your Honor, except that there may well be other contractual provisions which are in effect rougher on the producers and this may not be the limit to which they go in tying up the producer in this regard.

It is just the only one which we have been able to get our hands on this far.

MR. HRUSKA: The question on music in the can is what rights the producer receives from the publisher or the composer of the music. We have had evidence in this case through the person of Johnny Green, who was an officer of the CLGA, that that CLGA contract is the contract used between producers of programs and writers of music.

Now, we are going to have, in this case some

very interesting questions in the post-trial briefing regarding the interpretation of that contract. I know right now that ASCAP and CBS are going to disagree as to what that contract means, but that is the contract.

There is no secret about that. It is the contract between producers and composers of music.

THE COURT: But that doesn't seem to me to meet the point that Mr. Davidson is raising which is who takes the risk between CBS and the producer, isn't that it?

MR. DAVIDSON: That is exactly the point. That CBS is the plaintiff and if they have no risk, they have no case, it seems to me.

THE COURT: I think that is pretty dramatic, but anyway I think that the question of risk is at least relevant here.

Is this a burdensome thing?

MR. HRUSKA: Enormously. They are asking for hundreds and hundreds of contracts here.

MR. DAVIDSON: Your Honor, in the context of this case, I don't think this is unduly burdensome. Both of the defendants have spent well into the six figures in complying with discovery and I really -- CBS has had so many professional and para-professionals in the courtroom that in the context of this case, I don't think it is so

bb-10

burdensome, particularly since Mr. Sipes testified there was some sort of standard form and doubtless large numbers will fall into the small categories but I can't see any other way of asking for the information.

THE COURT: Is there any time limit to this? You say one copy of each agreement.

MR. DAVIDSON: The program schedules are for specified periods. I believe we selected one in 1970 and another in 1972, although I am not certain.

MR. BRUSKA: I think you go back through all the program schedules.

Your Honor, can we focus on this question because I do believe that Mr.DAvidson is wrong on, in terms of relevance.

If the television network says to a producer, look, if we tell you fellows that the music you want to use on that program cannot be obtained from ASCAP and BMI, so if you want to use that music you are on your own, in terms of if there is any infringement and we are sued, you are going to indemnify us, I just don't think that that has any --

THE COURT: All that I am holding at the moment is that I think that BMI is entitled to have the facts,

whatever they are.

If you are in a position to represent,as distinct from stipulate, if you are in a position to represent that each of the agreements sought here --

MR. HRUSKA: They don't go any further than this. In fact, there are a number of them that don't have any provision on this at all. We have made some survey on it.

THE COURT: That either there is no provision or that each of the agreements which does have a provision contains a provision substantially as described in Mr. what's his name's affidavit, I would be satisfied with that and see no reason in delivering hundreds,or whatever number there is, of documents nor, indeed, being concerned with them.

Now, I don't know that you are in a position to represent that at the moment.

MR. HRUSKA: No, I couldn't.

THE COURT: But I do think that you either have to -- well, that you have to review these contracts and be prepared to make a statement which will take care of the problem or let me consider it at that time.

MR. HRUSKA: Let us then make a good faith survey of this and then be in a position to make a representation to your Honor, and to BMI.

bb-12

THE COURT: All right.

MR. TOPKIS: Your Honor, I would imagine -- I don't mean to horn in on Mr. DAvidson's show -- but I would imagine that we will have exactly the same kind of inquiry when Mr. Gitter gets together with Mr.Baker on his investigation of how much substance there is to the music in the can claim, because you can't very well appraise the significance of the music in the can problem without looking at the contract that may or may not immunize CBS.

gab-1

MR. HRUSKA: The contract that is of significance, your Honor, is the contract between the producer and either the composer in the case of music written for the program, or the music publisher in the case of the producers obtaining rights to previously published music.

MR. TOPKIS: That I don't agree with. If CBS has an indemnity, for example, from the producer as per-ance rights, it seems to me that is a pretty critical consideration for your Honor to give attention to. That is what we want to take a look at.

THE COURT: Mr. Baker.

MR. BAKER: On the basis of the robing room conference, it was my understanding that what that inquiry was to focus upon was providing sufficient evidence to show that there was a $100 million worth of program material in the can and who owned the performance rights.

Am I now to understand that the inquiry is being expanded into the contractual relations between CBS and whoever they acquired that material from, the program material from, and the relationship between whoever made that program material and their writers?

The question of who owns the performance rights is very easily solved simply by supplying copies of cue

sheets and ASCAP has records to the extent that that music is owned by their members as to who owns it.

MR. TOPKIS: Look, I am not putting the slightest limitation on Mr. Baker's investigation of Mr. McLaughlin or anybody else he wants to talk to at ASCAP. So far as we are concerned, he can come up there and spend the two days I agreed to asking anybody any questions. I want the same kind of freedom. I don't want to be told I have to look at cue sheets, I don't want to be told I have to look at something else that has been selected. I want to deal fairly and openly.

THE COURT: I am not sponsoring what Mr. Baker said.

I don't think you picked a particularly good analogy. It is not a question of openness of disclosure, it is a question of scope of disclosure, scope of discussion. I came away from the robing room discussions also believing that the only question was how much and maybe who owned.

MR. TOPKIS: How do you answer those questions except by taking a look at the contract? If the producer and the contract warrants that he owns the performing rights, doesn't that have significance and don't we have to look at the contract?

THE COURT: I am not sure whether you have to

look at the contract or whether you will accept a representation. The question of ownership doesn't seem to me necessarily to deal with the question of indemnity.

I am not ruling for you or against you on indemnity. It doesn't occur to me it was an issue in the previous discussion.

MR. BAKER: It now sounds to me like this thing has been expanded for the right to go up to CBS and roam through whatever files they like of programming --

THE COURT: I am going to leave this for the moment. I don't have more time to spend on this particular question at the moment. I thought we finally came to the end of the line on documentary and evidentiary questions.

Mr. Gitter and Mr.Baker will get together and Mr. Gitter will tell Mr. Baker the kind of information he thinks he needs to establish to his satisfaction what the value of this inventory is, and if there are subordinate differences between them on that, I will have to rule on them as they crystallize. I don't want to do it in theory.

MR. TOPKIS: Fine.

THE COURT: Is there anything else at this time?

MR. TOPKIS: Just our designations of deposition material, your Honor.

THE COURT: You mean to read into the record?

MR. TOPKIS: Right. We have a list which we can supply to the clerk. I regret to say that there have been some objections lodged by our friends of material that we want to either counter-designate or designate. There are no objections to the counter designattions. Let me withdraw that.

If I may just hand to the reporter a copy of our counter designations of Mr.Adams, Mr.Brachman, Mr. Brettler, Mr. Chiantia, Dr.Fagan, Mr. Finkelstein, Mr. Morris, Mr.Washington and Mr. Wattenberg, that will take care of that.

So far as our designations are concerned, we have material designated from CBS officers, Evans, Jencks, Paley, Poklitar is not an officer,Stanton, Wood. They are all already marked, I believe, as exhibits.

THE COURT: Are the objections numerous?

MR. TOPKIS: I think so, your Honor.

Could I suggest this to your Honor:

In the interest of saving your time, you will have to read this to rule on the objections.

Whenever you feel you have a need to look at a deposition, you can take a look at the objection at the same time and consider whether it is tenable or not.

That is the way after all that one rules on an objection. You listen to the question and you take a look at it.

THE COURT: I don't think Mr. Topkis' suggestion is laughable.

MR. HRUSKA: I wasn't laughing in a ridiculing way, your Honor. I won't define it.

THE COURT: It may illustrate the ridiculousness of the law. I don't know of any other way in the long run to approach it. You are going to tell me you don't think X is admissible. I have to see whether it is admissible. Doesn't it really come down to an argument?

MR. TOPKIS: I think so.

gawe 1

THE COURT: It doesn't make any difference whether I rule now or later?

MR. HRUSKA: I don't see--

THE COURT: You want to put the objections on the record. I can understand that.

MR. HRUSKA: Certainly.

I gather, and I thought this was the case, our objections fall into several limited categories. I think one or two of these have already been ruled on by your Honor. There have been a substantial quantity of pages of these depositions marked which contain ASCAP examination of CBS' witnesses regarding the motive for the institution of the case.

Of course, we have the basic position in this case that that subject is irrelevant.

There are also, your Honor, and I believe there's been a ruling on that in general--there are also questions concerning the per use proposal made by CBS in this case. I believe as your Honor has stated a number of times during the progress of this trial, the proposal of a CBS per use license is something which it is the obligation of counsel for CBS in this case to put forward.

So that if you were to get in these depositions statements made on the one hand by Mr. Poklitar and on the other hand by Mr. Paley, that might conflict in some way or

another. All of that is meaningless. The question is what is the proposal as put forward by counsel for CBS in this case? There's also a great deal of testimony about whether or not there ought to be a withdrawal right conditioned on withdrawal from the blanket licenses if they remain blanket licenses of NBC and ABC.

Of course, we withdrew that at the beginning of the case. We withdrew that aspect of the proposal. That testimony should fall another larger area of proof concerns discussions at CBS regarding the nature of the per use license prior to the submission of the case.

Those are basically the categories of objections.

THE COURT: I don't know whether you want to make any comment on that or not. I'm prepared to react to what Mr. Hruska has said and to say that in general the only relevance that I could see to any such testimony would be if it conclusively demonstrated the impossibility or the unfeasibility of the proposal as it finally developed.

I do not think that if Mr. X made a certain suggestion at an earlier time which has been revised now, that CBS should be debited with that statement unless its substance is such that it proves some inability to do what is now proposed or is so inconsistent with as to cast serious doubt on that.

If that's what you want to argue--

MR. TOPKIS: I agree with you, your Honor. I would make just this simple point. I don't want to go through these designations for at least the fourth time and argue them. If we cite any, I am sure we will cite them because they are directed to the issues which will be up for resolution by your Honor.

I am not going to cite material that is unrelated to those issues. Why in the name of God we should spend more time nitpicking over these depositions, I can't understand.

THE COURT: I don't think we should. At the same time I think it is proper for counsel to state their general position and for the Court to advise the parties what his reaction to those suggestions is.

I will receive the designations having advised you what my attitude is towards the admissibility of such material.

MR. TOPKIS: Very well.

MR. COLLINS: Your Honor, one final point.

If I can ask Mr. Topkis if he agrees to the change in the Stanton deposition transcript which I referred to on page 4 and 5 of my letter?

MR. TOPKIS: I don't know what you are talking about.

MR. COLLINS: We objected to three lines of that deposition unless a change was made, page 128, lines 9 through 11. We objected to the designation of those lines unless certain corrections are made on line 11 of that page.

MR. TOPKIS: I have no objection to the corrections.

MR. COLLINS: I assumed that. Thank you.

MR. BAKER: Your Honor, there are some objections in connection with the Poklitar deposition which are above and beyond what Mr. Hruska stated.

Rather than trying to sought them out, I would propose to hand the reporter a list of those objections together with my description of the testimony--of course, that doesn't control what the testimony actually is--and ask him to put them into the record.

THE COURT: Very good.

MR. DAVIDSON: Is this in effect your argument?

MR. BAKER: Basically what it is, it says page 113, line 1. Then it describes the testimony and states the nature of the objection.

MR. COLLINS: I would also like to hand the reporter a copy of our letter so that our counter-designations and our objections to ASCAP designations plus the correction will be entered into the record.

(Discussion off the record.)

(1)

4707

ASCAP Counterdesignations

Received IN EVIDENCE

Adams EBT - PX 250

Page 11, line 9	--	Page 13, line 24
Page 71, line 6	--	Page 73, line 12
Page 83, line 24	--	Page 83, line 25
Page 92, line 8	--	Page 95, line 4
Page 110, line 11	--	Page 119a, line 24
Page 168, line 20	--	Page 203, line 4

ASCAP Counterdesignations

Brackman EBT - PX 251

Page 15, line 9	--	Page 15, line 13
Page 17, line 2	--	Page 18, line 15
Page 19, line 24	--	Page 20, line 2
Page 29, line 3	--	Page 30, line 25
Page 30, line 15	--	Page 30, line 17
Page 31, line 5	--	Page 33, line 14
Page 34, line 2	--	Page 37, line 10
Page 41, line 6	--	Page 43, line 15
Page 49, line 8	--	Page 49, line 17
Page 50, line 6	--	Page 51, line 19
Page 52, line 3	--	Page 52, line 8
Page 61, line 2	--	Page 61, line 20
Page 68, line 8	--	Page 68, line 24
Page 70, line 23	--	Page 73, line 8

ASCAP Counterdesignations

Brettler EBT - PX 252

Page 16, line 23	--	Page 17, line 15
Page 37, line 2	--	Page 38, line 10
Page 102, line 7	--	Page 103, line 4
Page 119, line 8	--	Page 120, line 24
Page 150, line 11	--	Page 151, line 24
Page 184, line 6	--	Page 185, line 15
Page 192, line 17	--	Page 199, line 4
Page 209, line 4	--	Page 209, line 15
Page 227, line 13	--	Page 228, line 14
Page 417, line 21	--	Page 421, line 24
Page 449, line 20	--	Page 451, line 21

ASCAP Counterdesignations

Chiantia EBT - PX 254

Page 15, line 13	--	Page 18, line 23
Page 53, line 10	--	Page 59, line 9
Page 107, line 18	--	Page 111, line 14
Page 166, line 13	--	Page 168, line 9
Page 174, line 3	--	Page 176, line 18
Page 190, line 10	--	Page 190, line 19
Page 191, line 8	--	Page 193, line 18
Page 198, line 17	--	Page 199, line 18

ASCAP Counterd[illegible]gnations

Fagan EBT - PX 256

Page 3, line 19	--	Page 4, line 16
Page 5, line 10	--	Page 9, line 19
Page 20, line 6	--	Page 22, line 9
Page 40, line 10	--	Page 42, line 10
Page 54, line 13	--	Page 55, line 25
Page 56, line 20	--	Page 61, line 10
Page 62, line 19	--	Page 67, line 17
Page 68, line 22	--	Page 70, line 5
Page 73, line 9	--	Page 74, line 13
Page 95, line 15	--	Page 101, line 11
Page 111, line 2	--	Page 112, line 2
Page 113, line 12	--	Page 115, line 14
Page 119, line 8	--	Page 123, line 11
Page 137, line 2	--	Page 137, line 25
Page 138, line 15	--	Page 145, line 13
Page 171, line 10	--	Page 173, line 12
Page 174, line 11	--	Page 177, line 12
Page 180, line 19	--	Page 182, line 2
Page 184, line 10	--	Page 186, line 20
Page 241, line 11	--	Page 242, line 10
Page 250, line 10	--	Page 259, line 17
Page 267, line 14	--	Page 268, line 25
Page 277, line 20	--	Page 287, line 8
Page 296, line 24	--	Page 298, line 7
Page 346, line 3	--	Page 350, line 2
Page 383, line 20	--	Page 405, line 4
Page 412, line 9	--	Page 415, line 4
Page 415, line 25	--	Page 415, line 18
Page 421, line 19	--	Page 424, line 7
Page 442, line 7	--	Page 444, line 12
Page 448, line 14	--	Page 463, line 25
Page 469, line 12	--	Page 470, line 22
Page 472, line 21	--	Page 477, line 16
Page 478, line 22	--	Page 479, line 21

ASCAP Counterdesignations

Finkelstein EBT - PX 257

Page 83, line 18	--	Page 84, line 4
Page 85, line 12	--	Page 86, line 2
Page 133, lines 3-19		
Page 134, line 5	--	Page 135, line 14
Page 136, line 8	--	Page 137, line 8
Page 141, line 5	--	Page 143, line 2
Page 160, line 21	--	Page 166, line 5
Page 166, line 17	--	Page 167, line 19
Page 169, line 22	--	Page 170, line 22
Page 175, line 4	--	Page 176, line 17
Page 186, line 11	--	Page 187, line 22
Page 192, line 11	--	Page 193, line 6
Page 198, line 22	--	Page 199, line 10
Page 205, line 7	--	Page 207, line 25
Page 219, line 15	--	Page 221, line 13
Page 234, line 15	--	Page 236, line 4
Page 258, line 12	--	Page 259, line 16
Page 265, line 23	--	Page 266, line 14
Page 289, line 13	--	Page 291, line 3
Page 294, line 4	--	Page 294, line 10
Page 340, line 16	--	Page 340, line 23
Page 346, line 18	--	Page 347, line 10
Page 463, line 12	--	Page 464, line 16
Page 510, line 18	--	Page 510, line 14

ASCAP Counterdesignations

Morris EBT - PX 263

Page 136, line 6	--	Page 141, line 4
Page 146, line 3	--	Page 151, line 23
Page 177, line 15	--	Page 181, line 14
Page 188, line 11	--	Page 191, line 9
Page 201, line 7	--	Page 202, line 8
Page 212, line 23	--	Page 214, line 25
Page 216, line 10	--	Page 221, line 8
Page 222, line 20	--	Page 226, line 5
Page 227, lines 14-23	--	Page 232, line 21
Page 229, line 14	--	Page 256, line 4
Page 252, line 16	--	Page 262, line 20
Page 279, line 21	--	Page 295, line 11
Page ~~282~~ 283, line 3	--	

ASCAP Counterdesignations

Washington EBT - PX 265

Page 57, line 7 Page 84, line 7	--	Page 62, line 8 Page 90, line 24
Page 100, line 19	--	Page 101, line 2
Page 101, line 25	--	Page 104, line 7
Page 105, line 5	--	Page 105, line 15
Page 112, line 23	--	Page 112, line 25
Page 113, line 2	--	Page 116, line 8
Page 116, line 9	--	Page 119, line 8
Page 121, line 14	--	Page 124, line 25
Page 169, line 5	--	Page 169, line 10

ASCAP Counterdesignations

Wattenberg EBT - PX 266

Page 14, line 17	--	Page 26, line 4
Page 34, line 17	--	Page 35, line 22
Page 36, line 4	--	Page 37, line 22
Page 41, line 9	--	Page 42, line 14

(2) 10

ASCAP Designations

Received IN EVIDENCE
Subject to the Court's RULING ON
the Record.

Evans EBT - AX 319

Page 3, line 15	--	Page 3, line 16
Page 4, line 21	--	Page 6, line 13
Page 9, line 3	--	Page 10, line 9
Page 11, line 16	--	Page 12, line 24
Page 17, line 11	--	Page 29, line 5
Page 29, line 19	--	Page 32, line 2

ASCAP Designations

Jencks EBT - AX 320

Page	4,	line	9	-	Page	4,	line 22
	5		11	-		10	10
	12		13	--		17	[illegible]
	[illegible]		[illegible]	--		19	18
	22		15	--		22	22
	23		3	--		26	[illegible]
	26		7	--		37	[illegible]
	38		10	--		40	[illegible]
	41		3	--		44	[illegible]
	45		**10**	--		**51**	**11**
	[illegible]		19	--		52	[illegible]
	52		19	--		55	[illegible]
	57		4	--		62	[illegible]
	63		18	--		[illegible]	23
	71		7	--		75	21
	76		2	--		[illegible]	19
	80		6	--		80	10
	80		16	--		85	18
	87		20	--		90	3
	91		9	--		91	15
	94		25	--		[illegible]	11
	99		19	--		100	25
	103		25	--		105	10

ASCAP Designations

Paley EBT - AX 321

Page 3, line 16	--	Page 17, line 21
Page 18, line 21	--	Page 19, line 11
Page 22, line 10	--	Page 23, line 5
Page 25, line 3	--	Page 27, line 7
Page 28, line 13	--	Page 29, line 11
Page 37, line 20	--	Page 39, line 15
Page 42, line 14	--	Page 43, line 2
Page 46, line 7	--	Page 47, line 9
Page 70, line 7	--	Page 70, line 25
Page 113, line 13	--	Page 115, line 11

ASCAP Designations

Poklitar EBT - AX 322

Page	3,	line	8	--	Page	3, line	24
	8		18	--		9	16
	9		25	--		12	2
	13		11	--		14	23
	15		3	--		16	17
	23		4	--		25	10
	27		19	--		32	24
	33		16	--		34	5
	38		12	--		41	13
	42		13	--		43	2
	45		7	--		47	9
	113		25	--		117	20
	191		21	--		196	8
	206		6	--		208	2
	235		10	--		238	25
	242		5	--		242	20
	248		16	--		256	6
	262		7	--		262	21
	266		10	--		266	13
	272		8	--		274	13
	274		16	--		274	24
	308		24	--		311	8
	318		3	--		314	24
	332		9	--		330	25
	342		2	--		348	21
	348		19	--		350	14

ASCAP Designations

Stanton EBT - AX 323

Page 127, line 19	-- Page 131, line 20
Page 132, line 1	-- Page 132, line 11
Page 132, line 24	-- Page 134, line 8
Page 138, line 24	-- Page 142, line 6
Page 144, line 12	-- Page 145, line 6
Page 146, line 10	-- Page 147, line 10
Page 148, line 15	-- Page 149, line 20
Page 163, line 10	-- Page 163, line 18
Page 171, line 16	-- Page 188, line 3
Page 188, line 18	-- Page 191, line 17
Page 211, line 8	-- Page 212, line 6
Page 219, line 12	-- Page 220, line 12
Page 223, line 11	-- Page 230, line 15

ASCAP Designations

Wood EBT - AX 324

Page 3, line 19	--	Page 4, line 5
Page 14, line 9	--	Page 19, line 23
Page 20, line [illegible]	--	Page [illegible], line [illegible]
Page 22, line 15	--	Page 25, line 3
Page 26, line 22	--	Page 34, line 15
Page 36, line 11	--	Page 65, line 20
Page 68, line 11	--	Page 71, line 3
Page 75, line 22	--	Page 76, line 16
Page 84, line 10	--	Page 87, line 25
Page 88, line 17	--	Page 89, line 10
Page 89, line 24	--	Page 90, line [illegible]

CBS COUNTER DESIGNATIONS RECEIVED IN EVIDENCE AND CBS OBJECTIONS

In response to ASCAP's designations of portions of depositions to be read into the record, plaintiff counter designates the portions of those depositions set forth below:

Robert V. Evans--Page 3 line 17--page 4 line 20
Page 6 line 14--page 9 line 2
Page 10 line 10--page 11 line 15
Page 14 line 2--page 16 line 6
Page 16 line 7--page 17 line 10
Page 41 line 25--page 43 line 9
Page 44 line 14--page 46 line 12

Richard W. Jencks--Page 11 line 17--page 12 line 12
Page 55 line 10--page 56 line 10
Page 66 line 14--page 68 line 21
Page 70 line 19--page 71 line 6
Page 75 line 21--page 75(a) line 4
Page 86 line 2--page 87 line 19
Page 91 lines 16-25
Page 93 lines 2-10
Page 101 lines 2-17

William S. Paley--Page 17 line 22--page 18 line 3
Page 19 lines 12-13
Page 20 line 20--page 21 line 5
Page 21 line 17--page 22 line 3
Page 45 lines 6-16
Page 105 lines 15-21
Page 110 line 17--page 111 line 23

E. D. Poklitar--Page 3 line 25--page 5 line 15
Page 7 line 16--page 8 line 13
Page 12 line 3--page 12 line 24
Page 16 line 18--page 17 line 22
Page 18 line 25--page 21 line 15
Page 25 line 11--page 25 line 22
Page 26 line 4--page 27 line 19
Page 35 line 11--page 36 line 9
Page 54 line 9--page 55 line 19
Page 117 line 21--page 118 line 9
Page 129 line 14--page 130 line 9
Page 239 line 7--page 241 line 21
Page 242 line 21--page 242 line 23
Page 259 line 3--page 259 line 11
Page 265 line 10--page 265 line 23
Page 266 line 7--page 266 line 9
Page 266 line 14--page 266 line 18
Page 270 line 5--page 271 line 6
Page 271 line 10--page 272 line 7
Page 274 line 25--page 275 line 16
Page 310 line 25--page 312 line 10
Page 339 line 2--page 339 line 10

Frank Stanton--Page 6 lines 8-14
Page 10 line 15--page 11 line 22
Page 24 line 20--page 25 line 15
Page 28 line 17--page 29 line 11
Page 32 lines 6-10
Page 33 lines 5-17
Page 36 line 22--page 37 line 2
Page 52 line 21--page 54 line 3
Page 68 line 17--page 69 line 8
Page 83 line 18--page 85 line 4
Page 95 line 3--page 96 line 19
Page 109 line 24--page 110 line 16
Page 119 line 12--page 120 line 4
Page 145 lines 7-20
Page 149 lines 22-24
Page 192 line 14--page 193 line 4
Page 212 line 7--page 213 line 11

Robert D. Wood--Page 4 line 6--page 14 line 8
Page 34 lines 20-25
Page 35 line 25--page 36 line 9
Page 65 line 17--page 66 line 12
Page 67 line 20--page 68 line 4
Page 74 line 17--page 75 line 12
Page 76 line 17--page 81(a) line 2

4724

Plaintiff objects to the following ASCAP designations:

Robert V. Evans--Page 17 line 11--page 29 line 5
Page 29 line 19--page 32 line 2

Richard W. Jencks--Page 13 lines 4-25
Page 14 lines 9-14
Page 14 line 22--page 17 line 11
Page 18 line 3--page 19 line 18
Page 22 lines 15-22
Page 23 line 3--page 26 line 7
Page 28 line 7--page 37 line 8
Page 38 line 10--page 40 line 7
Page 45 line 10--page 46 line 8
Page 51 lines 7-11
Page 51 line 19--page 52 line 6
Page 52 line 19--page 55 line 9
Page 57 line 4--page 58 line 11
Page 64 lines 3-22
Page 77 lines 5-15
Page 78 line 10--page 79 line 18
Page 80 lines 6-10
Page 81 lines 4-20
Page 82 line 20--page 84 line 7
Page 84 line 16--page 85 line 15
Page 89 line 19--page 90 line 3
Page 91 lines 9-15
Page 94 line 25--page 97 line 8
Page 99 line 19--page 100 line 13
Page 104 line 7--page 105 line 9

William S. Paley--Page 13, line 5--page 15, line 18
Page 25, line 3--page 27, line 7
Page 28, line 13--page 29, line 11
Page 37, line 20--page 39, line 15
Page 42, line 14--page 43, line 2
Page 46, line 7--line 25

E. D. Poklitar--Page 113 line 25--page 117 line 20
Page 206 line 6--page 208 line 2
Page 242 line 5--page 242 line 20
Page 266 line 10--page 266 line 13
Page 318 line 3--page 318 line 24
Page 332 line 9--page 338 line 25
Page 341 line 2--page 346 line 21
Page 348 line 19--page 349 line 14

Frank Stanton---Page 24 line 12--page 24 line 18
Page 29 line 11--page 29 line 23
Page 30 line 17--page 30 line 22
Page 32 line 11--page 33 line 4
Page 34 line 3--page 36 line 13
Page 39 line 7--page 40 line 3
Page 41 line 11--page 44 line 18
Page 47 line 20--page 48 line 23
Page 56 line 24--page 58 line 25
Page 64 line 4--page 68 line 15
Page 132 line 12--page 134 line 20
Page 137 lines 2-18
Page 146 line 10--page 147 line 10
Page 163 line 10--page 163 line 18
Page 183 line 21--page 184 line 25
Page 188 line 18--page 191 line 17

Robert D. Wood--Page 22 line 15--page 25 line 8
Page 28 line 21--page 31 line 2
Page 40 line 24--page 55 line 6
Page 57 line 16--page 65 line 20
Page 68 line 11--page 71 line 3
Page 75 line 22--page 76 line 16
Page 85 line 2--page 87 line 25
Page 89 line 24--page 90 line 20

Plaintiff also objects to ASCAP's designation of page 128 lines 9-11 of the Stanton deposition transcript unless the following corrections are made on line 11: Insert "did" between "analysis" and "the"; strike "did" after "Court"; insert

"?" and delete the period at the end of the line.

Very truly yours,

J. Barclay Collins

J. Barclay Collins

Max Gitter, Esq.,
Messrs. Paul, Weiss, Rifkind,
Wharton & Garrison,
345 Park Avenue,
New York, N. Y. 10022.

BY HAND

George A. Davidson, Esq.,
Messrs. Hughes, Hubbard & Reed,
One Wall Street,
New York, N. Y. 10005.

BY HAND

48A

CBS OBJECTIONS TO POKLITAR TESTIMONY

P. 113, l. 25-117, l. 20

This testimony concerns whether Mr. Poklitar believed in 1970 that a per-use license was feasible and his understanding of the nature of that license in 1970, together with his discussions on these subjects with Mr. Sipes.

Objection: Such evidence relates to the motive for bringing this lawsuit (which the court has already ruled to be irrelevant) and the type of relief which palintiff seeks in this action. With respect to the latter point, the court has ruled that it is for counsel, and not the employees of CBS, to define the type of license plaintiff seeks. In addition, it is well established on this record, that Mr. Poklitar is not a businessman, an economist or a lawyer, and thus, his perception of how the per-use license might work is wholly irrelevant.

P. 206, l. 6-208, l. 2

The testimony sought to be introduced here relates to the mechanics by which ASCAP and BMI members and affiliates would withdraw their works from the per-use license.

Objection: The court has previously ruled that statements concerning the nature and operation of the per-use license

shall come from counsel fro CBS and not from employees of CBS. Thus the evidence is wholly irrelevant.

P. 242, l. 5-242, l. 20

Mr. Poklitar testifies here concerning his understanding as to the manner in which synch rights are obtained by producers. In the counter designated portion, immediately following (p. 242, l. 21-242, l. 23) demonstrates that Mr. Poklitar really does not know on a day-to-day basis what the producer does with respect to synch rights. Mr. Poklitar's understanding is irrelevant to any issue in this lawsuit in view of the fact that he has no first-hand knowledge of what television producers do with respect to the licensing of synch rights.

P. 266, l. 10-266, l. 13

This testimony relates to Mr. Poklitar's understanding as to whether a producer indemnifies CBS against copyright infringement for music performed on the show.

Objection: Mr. Poklitar's understanding on this subject is irrelevant, he is not a lawyer, and there is no evidence that he has ever seen any of the contracts between the producers and CTN. Indeed, elsewhere in the deposition he testifies that he has not seen any such contracts. Accordingly, Mr. Poklitar's understanding of the legal arrangements between the producers and CTN is wholly irrelevant as it is

Objection: What possible relevance can this have to anything in this case?

P. 341, l. 2-346, l. 21

Here Mr. Poklitar is questioned at great length concerning his opinion as to whether the per-use rates would be the same for all compositions; whether this court or anybody else would determine a fair price to be charged under the per-use license; and the extent to which Mr. Poklitar is familiar with the consent decree in United States v. ASCAP (which he testifies he has never read).

Objection: Mr. Poklitar's views on these subjects is wholly irrelevant. We have had expert economists testify concerning the manner in which per-use fees would be set as well as statements by counsel on this subject. Mr. Poklitar, having not been qualified as a businessman familiar with the setting of performance fees (or any other program element for that matter), as an economist or as a lawyer, has not been qualified to opine on these subjects and accordingly his testimony is incompetent, irrelevant and inadmissible.

P. 348, l. 19-349, l. 14

This passage concerns the nature of the withdrawal rights under the proposed CBS per-use licence.

Objection: The court has already ruled that statements

this subject are to come from counsel and not from employees of CBS.

4615	16	stockholders	stockholders'
4615	21	World's	world's
4616	6	has	attained
4616	7	"The	"the
4616	12	say	state
4616	24	all the	all in the
4616	24	reports.	report.
4616	25	waving	waiving
4617	12	1973	AX 173
4617	14	77 and 78.	177 and 178.
4620	7	that if	that, if
4621	20	pers-nally	personally
4621	25	EXcept	Except
4622	8	EAch	Each
4622	24	it was outside	he was outside
4623	2	CB S	CBS
4624	7	only	only,
4624	20	A	that
4624	24	ABC ASCAP	ABC-ASCAP
4625	18	litigant	litigant's
4625	2	7and 8	177 and 178
4626	18	Broido.	Brody.
4626	19	Finnel?	Finnell?
4626	22	Agencies	Agency
4627	2	sometime	some time

4627	14	position,	permission,
4627	22	offices	office (twice)
4628	16	Poklitar	Poklitar or
4628	17	CBS, had	CBS had
4628	23	wasput	was put
4629	15	certain	certainly
4629	25	fat ball	football
4630	11	why	whether it
4630	12	used or	used on
4633	20	for ever	forever
4635	3	its	it has
4636	7	signify	satisfy
4639	20	'68 and '72	'68 to '72
4639	25	figures.	figures?
4640	7	polling	pooling
4641	9	distributionof	distribution of
4641	18	Honor is that	Honor that
4642	6	is asking	as asking
4643	22	finy	finely tuned
4645	19	were necessarily	were not necessarily
4645	24	governments	government
4646	10	1789	1787
4646	16	creepy	creaky
4647	14	Y ou	You
4648	24	and 284	and 285
4648	24	listed	lists

4649	19	years six	year 1971 and six
4651	2	We	MR. TOPKIS: We
4651	16	Chapel	Chappell
4651	18	have	has
4654	20	groups. The	groups, the
4655	21	Barclay	Collins
4657	3	deal relatively	deal were relatively
4658	2	BMI,	and BMI,
4658	3-4	3M.¶ And	3M, No ¶ and
4658	12	music.	1972.
4661	9	MR.BAKER:	MR. BAKER:
4661	12	period on	period, on
4664	4	iformation	information
4664	5	useage	usage
4665	16	types	tapes
4665	20	types	tapes
4667	18	Davidson, will	Davidson will
4668	11	3M.	3M
4668	15,20	179	197
4669	12,15	Brandom	Brandon
4669	22	CBS of	CBS, of
4669	26	alist	a list
4671	2	Question.	Which one?
4671	12	Brandom	Brandon
4671	13	Chipdale	Chippendale

4671	19	contracts were,	contracts which were,
4672	21	questions	question
4673	19	is	are
4676	13	HEssentially	Essentially
4677	16	goofs	"goofs"
4677	21	system the	system, the
4678	10	documents.	documents --
4678	23	early.	irrelevant.
4679	2	include	conclude
4679	17	thing which	thing, which
4682	7	as to	(delete)
4683	4	relevance,	relevance
4683	9	their	ASCAP´s
4683	23	print out	printout
4684	14	is a	is an
4684	15	offered yesterday	offered it yesterday
4685	3	Pages	Page
4685	15	inadmissibility	admissibility
4685	16	proposed	Proposed
4686	14	CBS to	CBS, to
4686	14	McLellan	McClellan
4686	14	inhis	in his
4686	19	EVans	Evans
4687	11	DAvidson´s	Davidson´s
4687	12	EVans	Evans
4688	8	Blackwood testified	Blackwood, testified
4688	15	DEan´s	Dean´s
4688	19	Mr.Dean´s	Mr. Dean´s

4688	20	even	event
4689	12	so	as to
4689	17	computerising	computerizing
4690	7	Mr.Evans	Mr. Evans
4690	22	ou	you
4691	2	case,CBS	case, CBS
4691	17	Irecht	Precht
4691	21	correct	contract
4692	19	Mr.Poklitar	Mr. Poklitar
4693	25	have, in	have in
4694	2	briefing	briefs
4694	24	professional	professionals
4694	24	para-professionals	paraprofessionals
4695	4	the	(delete)
4695	14	DAvidson	Davidson
4696	13	hundreds,or	hundreds, or
4697	4	DAvidson's	Davidson's
4697	6	Mr.Baker	Mr. Baker
4698	8	as per-	as to per-
4698	16	a	(delete)
4700	16	Mr.Baker	Mr. Baker
4701	9	desig nattions	designations
4701	12	Mr.Adams	Mr. Adams
4701	12	Mr.Brachman	Mr. Brackman
4701	14	Mr.Washington	Mr. Washington
4701	18	officer,Stanton	officer, Stanton
4704	10	fall another	fall. Another
4706	12	sought	sort

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM	
vs.	Before: HON. MORRIS E. LASKER, District Judge.
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL	

New York, December 14, 1973

STENOGRAPHER'S MINUTES

Columbia Broadcasting System

vs. 69 Civil 5740

American Society of Composers, Authors and Publishers, et al.

New York, New York.
December 14, 1973
10:30 A.M.

(Trial resumed.)

(Exhibits PX940 through 958 were marked for identification.)

THE COURT: Good morning, everyone.

Mr. Hruska?

MR. HRUSKA: Yes, your Honor. We are now prepared to commence our rebuttal case.

I would like to call to the stand Mr. Fred Silverman.

F R E D S I L V E R M A N, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HRUSKA:

Q Mr. Silverman, you are employed by CBS, are you?

A Yes.

Q And could you tell us what your present position is?

A Vice-president, programming.

Q And that is for the CBS Television Network?

A Yes.

Q Could you briefly outline your background starting with graduation from college?

A Yes. I graduated from Syracuse University with a B.S. in speech and dramatic arts in 1958.

From Ohio State with an M.A. in theatre arts and television programming in '59.

From '59 to '63, worked at WGN in television in Chicago, an independent station owned by the Chicago Tribune.

Then I worked there in varying capacities and in April of 1963, joined the CBS Television Network as the director of dayt ime programs.

I believe in '67 I was named vice-president of daytime programs. In '69 vice president of program planning and development in New York, and in June 1970, vice-president of programs for the network.

Q What are your responsibilities in this present job?

A I am responsible for the development and the execution of all entertainment programs on the CBS Televisio

Network.

THE COURT: Are you in the same position that Mr. Dann was in?

THE WITNESS: Yes.

THE COURT: Are you his successor?

THE WITNESS: Yes.

Q At Page 3319-3320 during the cross-examination of Mr. Dann, a question was asked:

"Do you agree, Mr. Dann, that there is a present need in network programming for more musical variety programs?

"A I certainly do."

Could you, Mr. Silverman, give us your views on that subject? Do you agree with Mr. Dann, disagree?

A I think that there is a definite need for more variety programs on television, and I believe that we at CBS have been quite responsive to this need.

THE COURT: When you say, Mr. Silverman, or maybe I should have asked Mr. Dann too and I don't think I did, that there is a need, what does the word "need" mean in that context?

THE WITNESS: I think that, Number 1, there is a public thirst for the form, for the variety form.

Look at the performance of variety programs on televisionthis season, the form is doing very well. The Sonny & Cher Show on Wednesday at 8:00 is receiving higher ratings now than it ever has in the three and a half years it has been on the air.

The Carol Burnett Show on Saturday night in our schedule is doing better than it ever did before in, I think, a five-year run.

The entertainment specials for the most part are earning larger audience ratings and audience shares than the shoes that they are preempting.

THE COURT: Could you give examples of that?

THE WITNESS: Yes. I think a case in point was the presentation of the Perry Como winter show this Monday night which earned a national Nielson share of 43 per cent in a time period where the regular programming had been averaging about a 28 share.

This past Sunday NBC presented two variety specials back to back, Bing Crosby and Bob Hope, and clobbered the competition.

I think that the average share for both shows was like half of the audience available during the two hour period.

I could just cite chapter and verse from the start of this broadcast season. There does seem to be a thirst and an appetite on the part of the public for good variety shows.

We try to be responsive this year in our special lineup and we will present by the time this season is over, I believe the number is, 23 hours of original special programming, you know, which is the equivalent of a weekly prime time variety show, you know, where we would order --

THE COURT: It is the equivalent of a full day, morning, noon and night.

THE WITNESS: But I think to put the 23 hours in perspective, I took a look at a television networks schedule for the '63-'64 season and it was ten years ago, and the number of original programs you know in the special area was seven hours, so that in ten years we have gone from 7 hours to 23 hours.

Q What is your view about the present program balance of the CTN schedule?

A I think we need more variety. I have been quoted in several different places as saying that. The variety form has always been a hallmark of the CBS Television Network. You know, going back to the very early days of the Toast of the Town, and the Ken Murray Show, and you

know we have been a leader in variety programming and I think that has happened is that television is a very cyclical medium and you know, we probably are at an all-time low.

I liken it very much to, I think it was '61, '62, in that area; we had a 24-hour schedule then. There were -- the CBS Network presented, I believe it was, three hours of regularly scheduled variety programming in the fall and winter of that season.

Two years later the number of hours had increased to six and a half hours and I believe that that will happen again. Fifteen years ago, there were 20 westerns on the air and now there are two. Five years ago there were three or four hours of detective shows and now there are 22, and you find a very, very big swing.

In my opinion, for any number of reasons the pendulum will swing back to variety programs.

THE COURT: This may be a sort of extra curricula question and I certainly hope that the energy crisis will not be prolonged but have you give any thought at CTN as to whether the energy crisis will effect viewing habits or increase your audiences because people will stay home more or anything of that sort?

THE WITNESS: It would seem that people will be looking at more television. I am not aware of any formal studie but I would imagine that viewing will increase as the crisis becomes more severe.

Q Well, let me ask you this, Mr. Silverman--you may have given part of the answer to this before.

Are you doing anything this season to correct the imbalance that you just referred to?

A Yes. Within the 23 hours of variety specials that we have presented or will present this season, there are six hours that could be called pilot specials; that is to say, they are specials but they also serve as program pilots for prospective series and we did six this year or will have presented by the end of March, six shows.

Q Before you go too far down that trail, I would like to make this perhaps a little more concrete and show you a document that we have marked for identification as PX 958 for identification and ask you to identify that docu-

ment if you could?

A Yes.

Q Could you tell us what that consists of?

A Well, this is a list of all the prime time variety specials CBS will present in this broadcast season.

Q This broadcast season?

A '73-'74.

MR. HRUSKA: And simply I think for informational purposes and filling in the testimony, your Honor, I would like to offer this list in evidence.

MR. TOPKIS: No objection.

THE COURT: Received.

(PX 948 received in evidence.)

MR. TOPKIS: I might ask, your Honor, is there any backup material available on this?

MR. HRUSKA: I think the backup material available on this is in the witness box at the moment.

Q I gather, looking at this list, that some of these variety specials have already been aired this season?

A Yes.

Q And that would be--

THE COURT: Up through Perry Como.

Q Up through Perry Como, right.

A The next show will air this coming Monday, Bobby

Van and Elaine Joyce.

I was saying that we presented six pilots for prospective series. Three of them to be called star dominated show where you know, you think you have a piece of talent and you try to develop a show to showcase the talent.

The other three shows are what I would term producer dominated concept variety shows where you come with a conceptual idea, you develop a program structure and then you go about casting it.

I think the perfect example of a concept show would be Laugh In or Hee Haw, you know, where the concept actually made stars out of many of the people involved.

Q Could you identify on this list the concept shows and perhaps the personality shows?

A Yes.

Q Within that group of pilots which you mentioned?

A The three personality shows are Cass Elliot, Lilly Tomlin and Bobby Van and Elaine Jones.

The three concept shows are The Shape of Things, The Orange Blossom Special and Oh, Men, Oh, Women.

The Shape of Things was presented in October. The Orange Blossom Special which was presented the week before Thanksgiving and Oh, Men, Oh, Women, which will be

taping in February for presentation in March.

Again, these shows, what we did was start out with a concept and then went and cast them.

Q What is the concept of the shape of things?

A The shape of things was a show that was conceived, produced and produced and performed by women. You know, it was a look at society today through the eyes of women and as such it was kind of an innovative hour.

Q How about the Orange Blossom Special?

A The Orange Blossom Special was an attempt to do a comedy variety show with country music flavor.

Q And how about Oh, Men, Oh, Women?

A Oh, Men Oh, Women, is a review about love and no relations between men and women, single, married divorced. It will be a rotating, a difference host each week. Five or six recurring comedy sketches and a musical wrap around.

THE COURT: What does that mean, a musical wrap-around?

THE WITNESS: It means the hostest one week would be Doris Day and she--she would front the show, would perform some musical numbers and do the lead-ins to some comedy sketches and production numbers.

Again the theme in this case is love.

Q You talked about what you believed to be present program imbalance, and you just talked about using the variety special and particularly the pilot special as a means of addressing or correcting the imbalance.

Could you tell us what other development efforts, if any, you are engaged on to correct this imbalance?

A Yes.

The major source of program development is in the variety form is the summer schedule. It is our plan to present at least four, probably five variety shows this summer. We find that to put a show on the air for five or six weeks, if it works, you have a great opportunity to bring it back in mid-season, in January. This is the way Sonny and Cher got on the air. They were given a five-week trial run in August and were so successful that they returned the following January in the prime time schedule.

We have six different projects we are evaluating

for the summer. There will probably be a couple of more added in the next few weeks.

We are seriously thinking of personality dominate variety shows starring Cass Elliot. This would be a comedy variety show produced by Peppiat Aylesworth.

Q This is for the summer?

A Yes. We are talking about another variety show with kind of a country feeling to it starring Charlie Pride, the black country music artist.

Q Could you spell that?

A P-r-i-d-e. That would also be produced by Peppiat Aylesworth.

We have had meetings the day before yesterday with McClean Stevenson's manager to do a comedy variety show with Arnie Rosen producing it, a show very much like the Carol Burnett Show which would be a five or six week replacement for Carol Burnett, Saturday night at 10 o'clock.

We are today doing a tape test, audition reel, with three youngsters called the Hudson Brothers, ranging in age from 18 to 23. They are a very obscure, unknown act. I think they made one or two records in England. They are kind of a combination of the Beatles and the Marx Brothers, believe it or not. I think we have something that could be very, very, very interesting, and they could prove

to be a very popular group.

We are doing this tape test television industry today, Alan Blythe and Chris Beard. They have designed a concept for these three youngers, that kind of an early evening hell's a popping. Here is a case we would take embyronic talent, the kids are embryonic and develop a highly structured variety show.

This is what we did for Sonny and Cher. When the Sonny and Cher Show first went on the air, because they had no experience fronting a weekly variety show--the show is a highly structured affair.

You don't want to throw, you know, a group of green kids into the breach. We have very, very high hopes for the Hudson Brothers.

In addition to that we are talking to Chuck Barris about doing a half hour version, a contemporary 1974 version of the Hit Parade where we would juxtapose contemporary hit songs with favorites of the past. I'm trying to think if I left anything out.

We are talking to Jimmy Coco, who came out of Calucci's Department, for our network. Who has a long and distinguished list of Broadway and motion picture credits about doing a one-hour comedy variety show.

Q Is he in the Neil Simon play?

A Yes, Last of the Red Hot Lovers. From this group of projects--we will recommend four hours, four to five hours of variety programs for the summer schedule. Anyone of these shows could be a candidate for the mid-season. What we do in a case like this, we put a show on for five, six weeks in the summer, we have an option to go to series in January. There's a series option involved. What we are not doing in the summer is filling time periods. I might add to that--I might add a development effort of this kind is very ambitious and costs considerably more than, say, you know, ordering Dan August reruns or what have you. I think it's a terribly important that the summer has been and will continue to be a major source of development. I look at our summer schedule. Sonny and Cher came from the summer, Hew Haw came from the summer. It's a fine way to introduce new people to the American public.

Q Is HeeHaw still on the air?

A Yes, it is in National syndication, I believe about 220 stations.

Q You had mentioned before the variety special pilot device.

Can you please tell us of any notable musical variety stars who have come out of that format and are now on prime time television network programs?

A Yes, Flip Wilson came out of a pilot special, Laugh In came out of a pilot special.

Q All right.

You had mentioned a couple of names in your list of program possibilities to fill your four or five slots this summer. One was McLean Stevenson.

A Yes. He's on MASH.

Q He's on MASH?

A Yes.

Q Which is a what?

A It is a half hour situation comedy. It is scheduled on Saturday night. In the case of McLean, he has a very good career on MASH. He wants to become a variety artist. We think potentially he can be of more value to our network in a variety show, fronting an hour variety show that he would be as part of an ensemble on MASH.

Hopefully he will have a shot this summer to prove himself.

If it works out, what he would do is finish his third year of MASH---they finish shooting by January--if he has a successful run this summer, he could end up fronting his own show as early as 1975.

Q Why won't any of the programs on this summer be on any earlier than the regular season than January?

A Well, we set our program schedule in late March, early April in order to get a schedule on the air in September.

Q That's for the fall schedule.

A Right.

Q I see.

A So we set the schedule before any of the summer shows will go on. I should mention a couple of these pilot specials are very active candidates for the fall schedule.

Q Are any of the pilot specials candidates for this summer other than Cass Elliot?

A Yes, possibly Van and Elaine Joyce.

Q Could you tell us who they are?

A Bobby Van and Elaine Joyce are a couple of Broadway performers. She starred for a couple of years in the David Merrick Show Sugar, the title role. Bobby Van was the Star of No, No, Nannette for three, four years, very talented musical comedy performers. They sing, they dance, they do comedy. This is the first time that they have ever worked together professionally. So what we are doing this coming Monday night at 10 o'clock on the full CBS Network is trying out a brand new act in prime time, in season. We are very pleased with the way the special came out. It is the first time they ever performed together.

Q All right.

I think you aluded to this before, but I would like to get this very clear in the record. What are your plans for the airing next season of the various musical variety programs you have just referred to, whether they be pilots that are being aired this season or summer replacement programs which will be on, of course, during the summer?

What are plans in terms of numbers?

A Out of the pilot program, this season pilot program and next summer's variety effort, we will increase the number of variety hours on our schedule by one, possibly two hours.

THE COURT: Per week?

THE WITNESS: Yes. If we don't--we are talking about a total of ten or 11 possibilities. If we don't come up with one or two, there will be somebody else testifying here next year. We think with that kind of a ratio we should be able to come up with a few of them.

I think the only thing that we have--we have a very successful schedule. You need a place to schedule them. You have to have program fall out. I have yet to see a season go by where there isn't plenty of that.

Q Mr. Silverman, what is your opinion regarding the

necessity in sustaining a musical variety program for a star performer?

A I'm sorry. I didn't--

Q Do you think you need a star personality to carry a musical variety program?

A Not necessarily. As I explained before, a variety program falls into two categories. You know in the case of a star dominated show, you need a show. In the case of a concept program, which is a producer dominated show, you don't need star. When Hee Haw was on the air, there were no stars to speak of. Laugh-In was a form--the form carried the show, not Rowan and Martin

You and I could have gotten up and pointed to the various people. There's a case of where the form made the show work. So that a star does not necessarily have to be part of a successful variety show.

In the case of the producer dominated variety shows, the shows end up building nine stars. Goldie Hawn before she was on Laugh-In was an obscure dancer and one season on Laugh-In and she was a major star and is now one of the biggest picture stars in the country.

2B gab-1 Silverman-direct

Q Mike Dann testified when he was here to the effect that the roots of variety talent are dying or have died.

Do you agree with that point of view, Mr. Silverman?

A No.

Q Could you tell us why you disagree?

A Well, I think some of the things that -- that we are talking about, have discussed this morning, certainly represent roots. In the television -- if you carve out an hour on December 17 for a Bobby Van, Elaine Joyce, I would consider that roots. The pilot specials, the summer development, you have another phenomenon that has developed in the past four, five years, which are the talk shows on television. Aisde from the Tonight Show, Cavett Show, Mike Douglas, Merv Griffin, Phil Donahue coming out of the mid-west. Maybe half a dozen different talk shows which enable young people, relatively unknown people, to get out and do their thing.

So far as areas outside of television, I think what has happened in the past ten years is that -- if anything, the number of places where young performers have an opportunity to do their thing is probably increased anywhere

from 30 to 50 per cent.

THE COURT: What kinds of places?

THE WITNESS: Well, what has happened is that the personal appearance field has kind of moved from the big cities into the more suburban areas and into the rural areas. Although there may be some very important night clubs like the Copacabana that have shuttered, what has happened is that there are places like the Westbury Music Fair, there have been Diner Clubs that have entertainment like the Meadowbrook, there have been hotel chains that have opened up like the Ramada Motor Inn, the Holiday Inn, the Sheraton chain.

I think the Ramada group is a perfect example. Ten years ago there were like 64 Ramada Hotels and now there are more than 500. I might add that 90 per cent of all of the Ramada group, you know, have rooms where there is musical entertainment. The entertainment can range from, you know, something in an organ to a combo. This entertainment -- this is entertainment and also provides music and everything for dancing.

Another thing --

THE COURT: You are talking about rooms. That is your definition merely of the population that is exposed to this entertainment?

THE WITNESS: That is right.

THE COURT: You are talking about entertainmen that takes place in the public parts --

THE WITNESS: That is right.

THE COURT: Liv. entertainment?

THE WITNESS: Yes. It will vary from a little organist to a rock and roll combo, to a larger group, you know.

I think certainly another thing that has happen very, very important, is the development of a Playboy chain that -- I think that the number of Playboy Clubs and restaurants, hotels have increased tremendously in the past ten years. I should add in any one of these Playboy situations there are at the very least three rooms going at any one time. This is singularly the Playboy Clubs and hotels have ended up being -- presenting the greatest opportunities for young comedy and comedy musical personalities to get some exposure and recognition.

It becomes terribly important to the booking agents. You have coffee houses that are springing up all over the place. There is a young lady that has made the cover of Newsweek Magazine, I believe it was Bette Midler, a smash at the Palace.

In a matter of a year and a half, two years ago

she was working in a place called The Baths. I think that is the name of it here in New York, some little joint in the middle of nowhere.

Q Are you by any chance talking to Bette Midler about a variety program?

A No, she already has a deal with ABC to do a couple of specials that could lead to a weekly situation. I think here is a case where,you know, she was obscure, work- in this off-Broadway situation and in a couple of years later a major network special deal and is breaking all records at the Palace.

Certainly look at Barbra Streisand. Barbara Streisand got her start ina small club called The Blue Angel, as did several other performers and now is a super-star.

Wayne Newton got his start in some small mid-western, southwestern room, his agents were telling me.

I just think that there are situations all over the country, in big cities, in small cities alike, where situations that didn't exist ten years ago.

Q You mentioned Cass Elliot before who has done a special for CTN and is one of your four or five poss-ibilities for summer replacement.

Do you know about the roots of that particular

talent?

A Yes. Cass Elliot originally was part of a group called The Mamas and the Papas. A couple of years ago she decided she had enough of that scene, she wanted to make it on her own. What her manager had to do was to create an act for her. Once you have a new act, you have to break it in somewhere. They took very, very small bookings, I think a year ago. The first booking of any kind was in a hotel in Pittsburgh. The name of the hotel escapes me.

That was a very small booking. She went on to Mr. Kelly's in Chicago, which is a room where young performers have -- get visibility and an opportunity to get some exposure. She was successful in Mr. Kelly's. That led to her making a deal with us to do a special. Now she is in demand all over the place. I believe she is booked in one of the big hotels in Las Vegas and is doing all of the major variety shows and, as I say, will probably end up having a summer show of her own on CBS.

There is this root system. This root system still exists.

The Westbury Music Fair, they will book people like Don Rickles, Sonny & Cher, and on the same bill with

Rickles and Sonny & Cher, you will find relatively unknown comedians or singers.

There are literally hundreds and hundreds of music theatres and theatres in the round, Diner Clubs, coffee houses where young people can have a chance. This is in addition to all of the things that I have discussed, you know, pertaining to the television media.

Q Have you made any plans this early for any musical variety specials for next year?

A Yes. We have already made a commitment to do a Donny Osmond musical variety special. Donny Osmond is the second youngest member of the Osmond Brothers. This will be the first time he has appeared by himself on television, starring in his own one hour special.

We have a deal set for Mary Tyler Moore to do a musical variety special. We are now talking to George Slaughter about doing a new version of Annie Get Your Gun with Cher. We are in negotiation with Goldie Hawn to do a musical variety special next year.

We also have a deal with Perry Como who will deliver three specials this season and three specials next season, winter specials, Easter special and a post-opening season special.

Our plans are very well along. We are very proud of our specials effort. You know, two years ago we weren't doing too much in that area and now I think that we have become the Number 1 network in variety specials.

Q You mentioned negotiations with Goldie Hawn's agent. Are you in negotiations with anybody else for specials?

A Well, we are having some preliminary conversation now with the William Morris office about doing a variety pilot special with Doris Day. We may have a similar situation with Sandy Duncan who a lot of people forget is a dancer and a musical comedy star first and foremost.

Q Does an hour of a musical variety program cost more to produce than anhour of a story format program?

A No. As a matter of fact, in most cases it probably is less.

Q I would like you to assume, Mr. Silverman, that NBC and ABC had developed the talents and the concepts to increase the number of musical variety shows on their network by, let's say, two to three programs each, and further assume that for some artificial reason you were not able to increase your own variety programing. Do you believe that under those circumstances you would be at a serious competitive disadvantage?

A Sure.

MISS KEARSE: Could I have the question read back, please, your Honor?

THE COURT: Will you read it back, please?

(Question read.)

MISS KEARSE: I object to the question on the ground there is no foundation for the assumptions in the question. I move to strike whatever answer has been given

THE COURT: I really think that the question itself almost stated that by saying it was an artificial reason. If there is a real reason, I certainly would be glad to listen to it.

MR. HRUSKA: Artificial reason why CTN could not do the same.

Obviously the reason I have in mind, your Honor, is the reason which we believe and we believe we have demonstrated in the case would eventuate in the case of a bypass.

THE COURT: All right. I assume the bypass has beenunsuccessful.

MISS KEARSE: What is the foundation for the first part of the question, that NBC and ABC have increased their capacity?

THE COURT: I am willing to believe that that

is a reasonable possibility, just as CTN apparently at the moment is increasing its capacity. You may go ahead and answer the question.

A Well, it would put us at a terrible competitive disadvantage. You know, the process of program development in any form, whether it is comedy, variety, dramas, it is terribly difficult and you have a situation now where there are three networks out for the same talent, the same creators and you are saying that if they had access to things that we didn't have access to -- I think that would be terrible. I mean it is tough enough if everybody has access.

MR. HRUSKA: I have no further questions on direct of Mr.Silverman, your Honor.

CROSS-EXAMINATION

BY MR. TOPKIS:

Q Just a very few questions, I think.

You said that you talked with a number of people for specials for next year. Have you by any chance talked with Bing Crosby?

A No.

Q And you haven't talked with him for the following year or the year after that?

A No.

Q So it would be a matter of total indifference to you whether or not Bing Crosby could sing White Christmas for the next year or the following years, is that right,

except for your personal affection for Mr. Crosby?

A I think Bing Crosby is terrific. The reason we haven't talked to him is that he has a long term deal with NBC.

Q I am delighted to hear it.

Now, you mentioned Donny Osmond as a possibility for next year.

A That is a commitment, it is not a possibility.

Q That is a commitment?

A Right.

Q What is his older brother doing?

A The rest of the group will appear for about three or four minutes. He is the star of the show.

The name of the show is The Donny Osmond Special.

Q You have had this feeling for some years, I take it, that there has been a dearth or an insufficiency of variety shows, is that right?

A Well, I have had it for as long as I have been in the job, which is a little over three years.

Q And during that time you have done your best to correct it?

A Put Sonny & Cher on.

Q And nothing else?

A No. The summer before last I put on four variety

shows, David Steinberg, Melba Moore and CliftonDavis, Jerry Reed, John Biner. We had four shows on the boards last year all set to go, but there was a technicians' strike.

Q So you were --

A Writers' strike.

Q So you were trying your best each year and what you wound up with was Sonny & Cher?

A Yes, but to wind up with a show that is in the top ten -- Sonny & Cher right now are the biggest variety personalities in the word, so I think it is a pretty good track record. I am delighted for you, sir. I am not speaking critically in the slightest.

I suppose you would agree with me that down through the years, an awful lot of stars were developed on the borscht circuit?

A Some. Not an awful lot of stars, not a lot of variety stars. I think past the Milton Berles, and Flip Wilson didn't come out of the borscht circuit and Sonny & Cher.

Q I don't think they would let him in.

A Bob Hope didn't come out of the borscht circuit. I think most of the people who have come out of the borscht circuit are still in the borscht circuit.

Q And a lot came out of burlesque, you agree with me, I am sure?

A Yes.

Q And a lot came out of the legitimate theatre, musical comddy?

A And still do.

Q Now, tell me, sir, can you name for us any television personality of today who had his training at the Ramada Inn?

A Without taking a list, I couldn't, and I am not going to ad lib. But I will say one thing, I don't know whether Wayne Newton came from a Ramada Inn, but it was from a room very much like the Ramada. I will get the name of the place where he did come from.

Q Just so the record will be complete, who is Wayne Newton?

A Wayne Newton is one of the biggest singers in the country in personal appearances.

Q I will take your word for it. I am not challenging it.

I probably wouldn't even be able to appreciate a variety program in which the host was Alan Hruska and the guest star was that lovable Judge Morris E. Lasker.

I just suffer from deficiencies of taste.

MR. HRUSKA: Well, that sounds like a smash.

Q Would CBS be willing to finance that as a summer special, offhand?

MR. HRUSKA: That is confidential, your Honor.

Q Now, I take it that as of this moment, you have no new variety show planned for next year?

A That's not true.

Q Next fall.

A I just said that of the six that we are doing, there are at least two very, very strong possibilities for the fall.

Q Right, and you hope that the two strong possibilities will develop into one actuality?

A Yes. I would hope it would only be none. I hope there will be no actualities. I think the greatest thing that can happen is that we go into our scheduling meetings in March and need no new programs, although I don't think that will happen.

Q The best thing would be to have no new variety shows?

A I didn't say that. I said the best thing that could happen from our point of view would be to say that we don't need any new programs of any kind. That means you

are tremendously successful. That has never happened before.

But to just keep the record straight, of the si shows that we have done, there are two very strong possibilities for the fall scheduling.

Q But if you are lucky you wouldn't need them?

A We wouldn't need anything.

MR.TOPKIS: I wish you luck. I have no furthe questions.

THE COURT: Miss Kearse?

CROSS-EXAMINATION

BY MISS KEARSE:

Q Mr. Silverman , you mentioned talk shows such as Johnny Carson and Merv Griffin and perhaps Mike Douglas. I am not sure I caught the whole list that you mentioned.

Do you watch those shows from time to time?

A Yes.

Q And have you seen recording artists performing current hits on those shows?

A Yes.

Q Have you seen them sometimes performing newly recorded songs?

A I think so.

Q Are you aware that artists frequently appear fo

scale on those shows?

MR. HRUSKA: Objection, your Honor. That is irrelevant.

THE COURT: I don't know what the term means so I can't rule.

Q Do you know what scale means?

A Yes.

THE COURT: I don't.

Q Will you tell us what scale means?

A Well, in this context I have been led to -- we don't have a show of that kind on the air -- that people will go on the air and I think the minimum payment is $360 or $380 for a performer on the Johnny Carson Show.

THE COURT: Scale means a minimum?

THE WITNESS: Minimum. In this case it would be, I think it would be actually the minimum involved.

Q Are you aware that artists frequently perform for scale on shows of that sort?

A So I am led to believe. I don't have any direct experience. As I say, we don't have any programs of that kind on the network.

Q Have you seen the late night rock concerts on ABC and NBC?

A No, I don't like those shows.

Q Did you happen to see the Merv Griffin Show last night on which a performer and writer of music named Tony Orlando was performing one of his current hits and hold up the album in which it was recorded?

A No, I didn't.

Q Did you know that Tony Orlando is a former vice-president of two of CBS music publishing companies, namely April and Blackwood?

A I don't know who Tony Orlando is.

MISS KEARSE: No further questions.

REDIRECT EXAMINATION

BY MR. HRUSKA:

Q Is there, in your judgment, any realistic possibility whatsoever that CBN's fall schedule in the 74-75 season will be identical to the schedule you are now running?

A No. That is wishful thinking.

MR. HRUSKA: No further questions.

THE COURT: Thank you, Mr. Silverman.

(Witness excused.)

MR. HRUSKA: Now, your Honor, I would like to call to the stand Dr. Franklin Fisher.

FRANKLIN FISHER, recalled as a witness, having been previously sworn, was examined and testified further as follows:

FURTHER DIRECT EXAMINATION

BY MR. BRUSKA:

Q Dr. Fisher, I think Mr. Blumstein opened up the examination of Mr. Nathan by asking him whether something of significance was about to happen.

I would like to ask youessentially the same question. Is something of professional significance about to happento you?

A Yes. In two weeks tomorrow I will receive the John Bates Clark Award of the American Economic Association.

Q And could you tell us what that award is given for?

A Yes. The John Bates Clark medal is given once every two years to an economist under the age of 40 who has made a significant contribution to economic science.

THE COURT: Is that a university award?

THE WITNESS: No. It is a professional award from the American Economic Association.

Q What is the American Economic Association?

A It is the, as its name implies, it is the

general professional association of economists in this country.

Q Since you testified here last May, have you undertaken any further work in preparation for today's testimony?

A Yes, I have. I have read the transcript of the trial for the time after I testified and for the period of time when I wasn't actually here and I was present during the testimony of Mr. Nathan and the testimony of Dr. Steiner so that I have either read or been present at the testimony of all the ASCAP and BMI witnesses.

Q Mr. Nathan and Dr. Steiner gave some testimony regarding their views as to whether the per use rate schedule which may be established in this case would operate as a ceiling price.

Do you recall that testimony?

A Yes, I do.

Q Do you agree with it?

A No, I don't.

Q Could you tell us why?

A Well, I would like to separate my answer into a discussion of published music on the one hand and of music written for the program on the other, and let's start with

published music.

Both Mr. Nathan and Dr.Steiner agreed that there would be withdrawals under the per use system. Mr. Nathan said that there would be massive withdrawals if the rate was set as low as I think it came out to about one-third of the present distribution rate and he agreed that if the rate was set high owners of the rights to particular unique music such as Irving Berlin would withdraw in the hopes of bargaining for higher prices for their music and he essentially agreed that in between there would be greater withdrawals the lower the rate was set.

Dr. Steiner also agreed there would be withdrawals but he wholly failed to comment when he testified on the ceiling price about the effect of the withdrawal right on the question of whether the per use rate would operate as a ceiling price.

Now, the thing about it I think is this -- if the per use rate is set at some given level, there will be music withdrawn by copyright proprietors who believe that they can command more than their level for their music.

I think those proprietors have to be judged, assumed to be the best judge of their own interests, they will be withdrawing for the purpose of negotiating higher prices, negotiations will take place with them at higher

prices than the per use rate; negotiations will take place for non-withdrawn music at lower prices or at the same price as the per use rate, but there will be negotiations both above and below.

Now, there are two sort of further things I think about that.

One has to do with what we might call really fungible music, music that is really interchangeable with other music. I am not actually familiar with either of the songs April or Misty that Mr. Chiantia discussed in his testimony, and I suppose if they are really interchangeable I am just as happy if I am not familiar with them , but it seems to me to be clear that what Mr. Chiantia was saying about those songs was they are not going to command a very high price in a competitive market; that the existence of a lot of close substitutes for a piece of music is simply going to prevent the competitive price of that piece of music from being very high.

Now, I think it is fairly clear and Mr. Nathan testified that copyright proprietors on the whole members of ASCAP are on the whole happy with the present distribution rates.

I think that has to mean that the proprietors of

music which is vastly interchangeable with other music are happy because they are getting more than they would in a competitive market for their price, that $800 is above the price for really interchangeable music.

If that is so, and I think it is so, then provided that the per use rates are set anywhere near the current distribution rates, it is probably going to be true that the price of really fungible music will be below the per use rate, but the price of really fungible music is going to be below that rate whatever the per use rate is set at. That is a feature not of the effect of the per use rate on the price of fungible music, but the fact that the price of fungible music is, in any case, very low.

The other feature about published music has to do with Dr. Steiner's testimony in which he disagreed with me about the self-correcting nature of the system. I had testified in May you will recall that I thought it didn't matter very much where the per use rate was set because it would be self-correcting if it were set low, there would be withdrawals and bargains would be struck above; if it was set high, there would be fewer withdrawals but bargains would be set on the whole below it.

Dr. Steiner said he didn't think that would be true. He didn't actually, as I say, discuss what the effect of withdrawals would be on that process in his testimony but he said that he thought that there would be only one direction and that would be downward.

I thinkwhat he had in mind there was a process which is really rather different from the process that I have in mind. I think what he envisaged was that the per use rate would be set, there would be bargains struck below the per use rate for music still in the repertoire and then the following year the Court would look only at the bargains struck for music in the system and finding that that was lower than the per use rate originally set would lower the per use rate toward the average of those bargains.

But there is no reason why that has to be so and I don't think that's the way the system ought to be operated. Because--

MISS KEARSE: Excuse me. Your Honor, I would like to object at this point and move to strike such portions of the testimony as characterizes what Dr. Steiner meant.

He was here, he could have been questioned about what he meant and I don't think it is proper.

THE COURT: I won't strike the testimony but I will accept it only as Dr. Fisher's explanation of or comment on a certain hypothesis which I don't necessarily agree with was demonstrated to me by Dr. Steiner.

A Anyway, I think it is wrong to suppose that in setting the per use rate for a future year the parties, if it is done by negotiation or the Court, if it isn't, are setting the price for music which has been in the repertoire in the previous year because depending upon what the per use rate is set at there will be withdrawals of some of that music or if it is set higher, some of the music previously withdrawn will come back into the repertoire. I think the appropriate thing to do is to look in the setting the price of music which is under the per use system is to look both at bargains struck under the rate and at bargains

struck above the rate. The bargains struck for withdrawn music and to try to arrive at some kind of fair average price for music.

There is no reason, if that is done, why the per use rate that is to drop, although I say again that if the per use rate does in fact drop what will happen is that more and more things will come out of the system and more and more bargains will be struck above theper use rate.

THE COURT: In other words, you think it might rise or fall and that's what you meant by self-correcting?

THE WITNESS: Well, I meant two things by self-correcting, your Honor. One was just the proposition that if it falls there will be fewer pieces of music negotiated under it and the other is the proposition that there is no reason why the parties or the Court have to operate it in such a way that it falls.

They can take into account the bargains struck outside the system as well.

Q Now, a good deal of what you have just said, Professor Fisher, depends on their actually being withdrawls. Am I correct in assuming that you believe that there will in fact be withdrawals from the system?

A Yes, I certainly do.

Q Could you explain why?

A Well, as I have said, I think both Mr. Nathan and Dr. Steiner agreed that there would be withdrawals. Dr. Steiner had less trouble with that, I think, than Mr. Nathan did. Mr. Nathan agreed that if the price was set as I said before too low or very low there would be massive withdrawals; if it was set at a high price, there would be withdrawals by such composers as Irving Berlin and that in between there would be an intermediate range.

Now, I think that is right. I think that people will withdraw if they think they can command more for their music than the per use rate and I think that they ought to know, so to speak.

THE COURT: You mean they ought to be credited as being right about their own interests.

THE WITNESS: That's right. Now, I realize that Mr. Nathan testified on a couple of reasons why it was that that mightnot happen. He said, I believe, that two things-- one was that if someone withdrew he would be so to speak, giving bad signals to CBS; he would be saying, I am going to be hard to deal with.

You know, I am going to hold out for a high price. Well, I find it hard to see that happening. Suppose that the price is set relatively high and proprietors of fairly unk music attempt to pull out. I find it hard to imagine, let's say, that Irving Berlin or Richard Rodgers or Burt Bachrach

command a higher price for their music than some, than the price that is commanded in general for most other music and I find it hard to see that a producer who wants to use such music, a producer for instance who wants White Christmas is going to say, you know, I am not going to go near the phone. He is going to want a higher price for that. That's bad news. I am not going to negotiate it.

The point about music which is not substitutable for other music is that it can command a higher price. What's more, proprietors of music withdrawn from the system, if they are afraid they are going to give off bad signals, and leave a lot of information in the system.

They can if what they want to do is command a high price for certain kinds of music but are willing to let the music go for other kinds of music at a lower rate, they can put a schedule of prices in the computer system; they can put in a notice that says, you know, call me if you are going to use it in such and such a way.

It is hard to imagine the phone call is not going to be made. The phone calls get made anyway in order to secure the synchronization rights. The phone calls-- its hard to imagine a producer who really wants to use a piece of music not bothering to pick up the phone to find out what's going to happen.

Now, Mr. Nathan also made another suggestion about why that wouldn't happen, a somewhat similar suggestion.

He suggested that it might be the case not that producers would stay away from proprietors of withdrawn music because they thought they might have to pay higher prices for that transaction but that they might stay away from proprietors of withdrawn music because they would hope to force the proprietors of withdrawn music back into the system.

I think for example it was, an example was put to Mr. Nathan in which something like 14 sets of people withdrew and Mr. Nathan said, well, but suppose that the producers in effect gang up, is my language, not his, and deal with onlytwo of them--then people considering withdrawing will say, well, my chances are only one in seven that they will deal with me.

It was very hard to see how that can happen. The people who withdraw, particularly the first people who withdraw, will be the people for whom there is not a lot of substitute. It is not possible for producers, particularly a large number of producers, to say, well, we won't use White Christmas; we will use the Beatles instead.

THE COURT: Well, you wouldn't use the Beatles

instead but suppose you used some Christmas Carol or something like that.

THE WITNESS: Well, there are not very many--there are some Christmas Carols which are not in the public domain. But there are not very many that the public expects to hear Bing Crosby sing but in any case, I think the point is that the opportunities for making that kind of substitution by ganging up appear to me to be very limited and the possibility of forcing people back into the fold this way--aside from that, it would take a lot of concerted cooperation on the part of the producers, that strikes me also as very--

THE COURT: I am sure I understand you but to be certain and for the record I want to establish that I do. That you believe that the dynamics of the situation just based on ordinary economic considerations are that the writers of unique music will be the strongest candidates for withdrawal because they know that there is the greatest demand for their music; they will be the first, therefore, to withdraw, so that if CTN were going, as a bargaining tactic to try to apply let us call a boycott approach, it would be the most difficult to do it with these people and it would be highly unlikely?

A That's correct. I think Mr. Nathan said that a

good deal would depend on the experience of the first people who withdrew; that if they had a good experience, others would follow.

THE COURT: Do you agree?

THE WITNESS: I certainly would agree and I think that the experience of the first people to withdraw is going to be the experience of the people who are in the best bargaining position for the use of their music and that their experience will in fact be good.

Oh, perhaps I could add something.

Q Yes.

A I was off at the top end on withdrawals of people with unique music.

I ought also to comment on something Mr. Chiantia said about fungible music which I am, which I commented about earlier.

What he said in discussing Misty and April was that he wouldn't withdraw April from the system because if he did he would know that he would be competing against a vast reservoir of works which include such things as Misty and he wouldn't want to be the first to withdraw because he would have a bad experience if he did that.

Well, I think most of what Mr. Chiantia is talking about, as I said before, is the fact that he doesn't want

to be out there with his song April competing in a world in which he has to compete on price with Misty. I believe he said you are going to use the price of Misty as a ceilin price and you are not going to take April from me if you can get Misty for less. I think that is quite true but that doesn't have anything to do with the per use system. It has something to do with price competition.

Nevertheless, as I said before, I think that the proper way to proceed is to set the price in the per use system sufficiently high at, let us say, something like the present distribution rates, sufficiently high that it isn't an effective ceiling on the price for really interchangeable music because one is fairly sure that the price of really interchangeable music is going to be low in any case.

Q I think you have just obsoleted my quotation from Mr. Chiantia's testimony. That was the part I was going to read.

Let's turn, then, to music written for the program.

Do you have a view as to whether or not the per use rate would operate a ceiling with respect to such music?

A Yes, I certainly do.

Well, let's start with Mr. Nathan's testimony on this point.

What Mr. Nathan said about this was that the--

MR. TOPKIS: If your Honor please, whatever the witness' views or recollection may be as to what Mr. Nathan said, he wasn't asked about that and while I wait eagerly for every word from Dr. Fisher, I think he still must be answering the question.

THE COURT: May I hear the question.

(Question read.)

THE COURT: Why don't you give us your views first?

THE WITNESS: I can't quote you the page number, Mr. Topkis--

THE COURT: That is not--I don't think Mr. Topkis is challenging your recollection of what Mr. Nathan said.

If you would give your own views first and then comment on what--

THE WITNESS: Well, I'll be answering no. I don't believe that it will operate as a ceiling for music written for the program. I think I'll go into it in detail in a moment. I think that to a large extent it has nothing whatsoever to do with the price of music written for the program except that the shift from the blanket system to the per use system would tend to increase the price of music written for the program because it would remove the competition of published music now priced at zero, as far as

the producer is concerned, and change it to the competitive of published music priced at something more than zero.

THE COURT: You mean zero at the margin?

THE WITNESS: Zero at the margin.

Can I go on now?

THE COURT: Yes.

I just want to get your own views first and then if you want to comment on the views of the other two witnesses, that's all right.

A Okay. Mr. Nathan said about this that since it would be contract N objective to reduce the price of music that it would reduce the price of music--it would reduce the budget which it gives to the producers, the producers were the lower budget would be in a stronger bargaining position vis-a-vis composers.

This would result in the price of music written for the program going down.

I think that demonstrably falls. Take an example that was presented to Mr. Nathan. Suppose that the current arrangement is that the composer is receiving $2,000 for writing the music and he stands to receive when the work is performed a thousand dollars in respect of ASCAP distributions.

He's getting a total of $3,000 for performing the service.

Now, I agree with Mr. Nathan when he testified that CBS is an intelligent logical economic entity who will seek to produce the best bargain that it can, but it doesn't seem to me that in the new situation CBS is going to be anymore intelligent, logical and economic than it is now.

If the writer will accept less than a total of $3,000 for performing those services, then he would be willing to accept less than $3,000 for performing those services now and the bargain would have already been struck.

I think it is misleading to talk about that in terms of if CBS could squeeze him, they will be squeezing him now. It is CBS who will be able to strike no harder bargain than they can now.

That is what the writer is willing to accept. If one looks at what will happen to music written for the program, I think there are three effects to consider. I think there's a big effect that will tend to raise the price of music written for the program and I think there are two smaller effects which will tend to depress it.

It is hard to know where to come out on balance, but I think the most probably effect will be to raise it.

Let me say why.

Currently when a producer bargains for music written for the program, he has a choice between paying something out of his budget at a positive price for the creation of that music or taking published music for a price which he perceives to be zero because it is zero at the bargain.

Under the per use system that choice is going to be altered. If he takes published music he will have to pay for it. That means the price of the substitute, the clearest substitute for music written for the program is going to no longer be zero but to be something reasonably

substantial.

In that situation I don't agree with Mr. Nathan that the per use rate will be used as a weapon, I think h said, to beat down the price of music written for the program.

In fact, the shift of per use will remove the weapon that can be so used, namely the weapon of the zero marginal price which the blanket license now provides.

That is the big reason. That's the reason why I think the price for music written for the program will go up.

I think there are also reasons to suppose that--tendencies to push the price of music written for the program down.

Let me take a minor one first. It is currently not the case in all situations that a composer when he thinks about this bargain knows in advance what he will get in respect of distributions for performance rights. In particular, if he is an affiliate of BMI, it is the case that the BMI system is sufficiently divorced from use that it is hard for him to know in advance what amount of money he's going to get for those performances. He knows it will be something. He can estimate what it is. He can't know it with certainty.

That means that in the example I gave in which he will get $1,000 for performance rights, he doesn't know it is going to be a thousand dollars. He knows it on the aver it might be a thousand dollars, let's say, but he knows the is some distribution around that.

If composers are risk adventurers, that is if-- if they would prefer a certain rather than a fair bet which comes--which averages the same thing, then it might be true that even though the average expect to get under the presen system in respect of performance rights is a thousand dollars, he might be willing to accept a smaller amount of money than a thousand dollars in return for the certainty that he's going to get it rather than the uncertainty he has to live with.

That's one possibility.

That's the possibility that I see affecting dire ly the price of--that a composer will demand for performing exactly the same services which he now performs, writing the same music.

He may, in fact, be able to get more because of the effect of the increase in the price of the substitute which I mentioned before.

There's another effect which may mean that the bargains which get struck are bargains which get st ck

for different kinds of music or with different composers and they might be struck at a lower price.

I think the easiest way to see this is the following:

Suppose that in the example I am giving where the composer stands to make a thousand dollars in respect of performance rights, suppose that in the new situation contract N were to give the producer a thousand dollars extra in his budget and the composer were to say to him: I now want a thousand dollars directly because I am not getting it indirectly.

What will the producer do?

Well, it is a well-known technique in economics to divide the effects of a price change, and in this case it is the change of the price demanded by the composer up by one thousand dollars, into two parts, one called the income effect and the other called the substitution effect.

The income effect occurs because when a price goes for something you are buying, it in effect affects your real income, you are poor because the things you are buying have gone up.

But in the example I have just spoken of, contract N has exactly offset that by giving a thousand dollars to the producer. That leaves as the only effect of the price

change what is called the substitution effect. It is a basic therum in economics that so long as any substitution is possible, there will be a movement in demand away from the commody whose price has gone up considering only the substitution effect.

Now, putting that into the language of the present case, that means that so long as any trade offs are possible between the music which is being bargained for and other music or other composers or between music and other inputs, the producer is going to say to himself: Yes, I have got this extra thousand dollars but the price of music has gone up a thousand dollars. Do I really want to accept the extra thousand dollars all on the same music?

If there's any way in his creative judgment that he can spend it better, some other way, then he will.

That will mean that a different set of bargains get struck and that the prices which he does pay for music for the program will from that effect go down.

THE COURT: This is the other side of the coin of the testimony of the producers in this trial, is it not?

THE WITNESS: Indeed, yes.

Q Mr. Nathan gave some testimony regarding the complexity of the per use rate structure that would have to be set by the Court in the event that the parties could not

arrive at that per use schedule through negotiations.

I would like to ask you whether you agree with that testimony?

A No, I don't. There's no reason why the parties in negotiating the per use rates or the court, if it comes that in setting it, has to duplicate the functioning of a competitive market in setting those rates.

In a competitive market there will be vast numbe of bargains struck for individual pieces of music used in individuals ways at many, many different prices, but there's no reason why the per use rates have to duplicate those transactions and, indeed, I believe Mr. Nathan testified that courts couldn't do that, and I believe he was right.

The point is that if rates are set in such a way as to simply be convenient, I think it would make sense to have it one standard rate for featured performances, another standard rate for background and so on.

Then to the extent that those rates do not represent the outcome of a competitive market, bargains will be struck away from those rates. If the rates are too high in a particular instance, there will be a bargain struck below it. If the rates are too low in another set of instances, there will be withdrawal and bargains will be struck above

There's no reason why the per use rates have to be set duplicate the outcome of that process. They are ju the beginning of it.

Q What about the need for different rates for the same uses of different songs?

A Well, I don't think there is any need--

MR. TOPKIS: Excuse me, your Honor. Is that an economics question?

MR. HRUSKA: I believe it is, your Honor.

THE COURT: I think it is as much economics as some of the other things have been asked about, yes.

I will allow it.

THE WITNESS: Well, that goes right into what I was just saying. First no need for the per use system to set different prices for different songs in the same use. On the other hand, there's no reason why it can't. It is a matter of what is convenient to the parties or the Court in setting the rates.

To the extent that different songs in the same use will command different prices, they will command different prices whether or not the per use system provides for that explicitly by having bargains struck at other rates.

Q Both Mr. Nathan and Dr. Steiner testified about what they believed to be the difficulties or I believe in

Mr. Nathan's case the impossibility of the parties being able to negotiate the per use rates on their own.

Do you agree with that point of view?

THE WITNESS: No, I don't agree with that at all.

I think it is, of course, true that in those negotiations there are going to be genuine problems to be resolved, but I think that's true in negotiations of all kinds.

What I think the problems that Mr. Nathan testified about come from have to do with I think the erroneous perception that the per use rate is going to operate as a ceiling price.

In my view, as I have testified, the per use rate will be self-correcting in the sense that if the rate is set too high bargains will be struck below it. If the rate is set too low, bargains will be set above it. That being so, the bargaining over the per use rate is, in effect, just a matter of bargaining over where the rates should be set in the sense of how many withdrawals are going to be prompted.

I have my own views about, you know, what I think a reasonable outcome of that procession should be, but I don't suppose that my views are better than the negotiated outcome of the parties and I don't see why they ought not to be able to come to an agreement.

Q In other words, you don't see any irreconcilabl conflict here?

A No, I don't.

Q Suppose that on the average under the per use system copyright owners end up getting less money than they now get. What economic significance would that outcome have to you?

A I think that would suggest that on the average they are now getting more than the fair competitive market value of their music.

I ought to say that although I think that might very well be the outcome on the average, it strikes me as by no means clear that that will be the universal experience of all copyright owners. In fact, I think it is quite likely that the owners of relatively unique music will get more than they now get.

As I have already testified, I think it is quite possible that composers of music written for the program will get more.

MR. TOPKIS: Could we have that answer read back, your Honor?

THE COURT: Please.

(Answer read.)

Q Turning to the question of a bypass. Mr. Nathan testified that he believed the 3M incident was confirmatory of his judgment that a bypass will succeed.

Is that a point of view of which you agree?

A No, it isn't.

Q Can you tell us why?

A Well,with respect -- I don't think Mr. Nathan knew the facts about the 3M incident. He testified that he hadn't read himself the depositions or the CBS part of the case with the exception of my testimony.

I thinkhe was just mistaken in some of the points.

For example, he didn't seem to realize that the amount of money, the amount of money being offered to some of the publishers to participate was substantially greater than they could get to make fromwired music services.

MR. TOPKIS: Excuse me, your Honor. I don't mind argument by counsel, but I really think argument by an economist, however distinguished, is inappropriate here. I think it is totally erroneous as a matter of predicate and I think it helps your Honor not in the slightest.

MR.HRUSKA: It is a matter of record in this case that music publishers, at least those within the top 14 music publisher groups, received from 3M offers that were either roughly at or substantially above levels of wired music distributions from ASCAP.

THE COURT: First of all, whatever an expert says when it is predicated on facts allegedly in the record.

is meaningful only if the facts described are correct. I don't know whether you are talking about whether Dr. Fisher's reference to the facts is correct or incorrect in your view or what you are trying to say is something else, Mr. Topkis.

MR. TOPKIS: I take it Dr. Fisher is saying Mr. Nathan is wrong on his facts and, therefore, some conclusion follows. I don't see how it helps us having Dr. Fisher saying Dr. Nathan is wrong on his facts.

THE COURT: That is what I was saying a moment ago. I would like to hear what his view is if he should be right about what he says.

MR. TOPKIS: Very well.

A Put it this way, I am prepared to go on. While that was going on I had found the place in the record where the issue was asked, not of Mr. Nathan, but of the amount of money involved in wired music.

THE COURT: I don't think Mr. Topkis is disputing the reference to the amount.

MR. TOPKIS: Not really. I just don't see --

THE COURT: As I understand it, you believe from what you heard of Mr. Nathan's testimony that he was not aware of that?

THE WITNESS: Yes.

MR. HRUSKA: That is at Transcript Page 4128.

THE COURT: That is what you are telling me.

MR. HRUSKA: At Transcript Page 4128, your Honor, the questions were asked of Mr. Nathan and he gave those answers.

THE COURT: Let's proceed.

A I did think Mr. Nathan said one thing of considerable significance in discussing the 3M incident. He said that there was risk to the publishers. You know, it is hard to see why there was risk to the publishers in the 3M incident. If they signed up with 3M, they would get money. They were being given some guaranteed advances. The chances are, if they didn't sign either somebody else would or the project would go away. If the project eventually went back through ASCAP, they would not be in a special position vis-a-vis 3M. It was, in effect, found money. One would think it was a no risk gain. When Mr. Nathan was questioned about this, he said they ran the risk of changing the way they did business as regards the other wired music services.

In particular, it would come back to haunt them in later negotiations. I think that is exactly right. I think what the publishers showed and the writers too through that out incident is a consciousness they were running the

risk of changing the way the whole system does business.

The letter from Mr. Spinner discusses the eff on the whole structure of performance rights.

MR. TOPKIS: If your Honor please, I rise reluctantly --

THE COURT: I will agree to strike the last answer. I agree with you, the reference to the letter o Mr. Spinner --

MR. TOPKIS: That letter was admitted not for the truth of its contents --

THE COURT: I will strike the answer. I don't think you need to elaborate. You do agree with Mr. Nathan that to the extent that he says that there was a risk of changing methods of business, that did happen, that risk did exist? The word risk seems to me to be an unusual word to use in that context. He happened to use it.

THE WITNESS: He did use it. I agree that it is the only risk involved in that situation. I think that the risk will be involved in changing ways of doing business in the event of a CMN bypass is manifestly much greater on a much more important issue.

If Mr. Nathan is right, that that risk accounts for the reluctance of some publishers to do business with 3M, then I think that suggestion that there would be

much greater reluctance to do business with CTN.

THE COURT: All right.

Q Mr. Nathan also testified that it was his belief that a CTN bypass would succeed if CTN gave what I think he referred to as anunequivocal signal.

Do you agree with that point of view?

A Well, I do and I don't. I suppose that is an equivocal answer.

I agree with it, but I believe that the only unequivocal signal that CTN could possibly give would be if it were in a position where the Court had made it clear that it was not possible for CTN to be forced back to the blanket system by non-cooperation on the part of publishers and writers.

THE COURT: In other words, I take it another way of saying what you just said is that in your mind no matter how firmly CTN declared itself, no matter how long in advance,no matter what objective manifestations of one kind or another, it might give with regard to its intent to cancel its ASCAP license six months from now, you don't think the publishers would believe that?

THE WITNESS: Well, it is not so much a question of believe it. I think they believed CTN wanted to do it all right.

THE COURT: Would stick to it, I mean.

THE WITNESS: I think there would be a natural tendency just to sit back for a little while and see whether it was going to happen. Since I think the amount of time when it came down to the crunch and the programs were actually being taped, I think the amount of time that it would take for the system to fail is relatively short. I think that tendency would in itself result in a failure.

If CTN is going to succeed in a bypass, it requires a certain amount of cooperation on the part of copyright proprietors. They have got to either be prepared to deal themselves in a new kind of negotiations or they have to hire people to deal or they have to train people to deal and they have to put the names in the system.

The publishers have got to go out and obtain the written consent of their writers for this. That is a fair amount of trouble, to help bring down a system with which they are very happy.

I think if they think about it, when the time comes -- if the time were to come when this was a reality, they would realize that on the whole their long range interests are in not having that system succeed.

The long range interests are to stay with the

present system. Mr.Brettler said that direct dealing would be self-annihilation. I think it was Mr. Morris who said it would be the end of the road for me as a publisher. In that situation --

THE COURT: Aren't they the best judge of their own interests?

THE WITNESS: I think they are the best judges of their own interests. I think when faced with the situation, they would at least say, why should I go to a certain amount of trouble, incur a certain amount of short run costs when if I sit back for a few weeks until the dust clears, I may not have to do it.

THE COURT: It seems to me, and I am just philosophizing now, that the critical issue here is as much in our field as in yours, the question of credibility.

I am certain -- that is not a good word for me to use before I receive briefs -- it seems to me we would all agree that any publisher who believes this is the best system is not going to voluntarily adapt himself to another system unless he thinks he has no alternative.

Would you agree with that approach to the problem?

THE WITNESS: I do agree with it. I think it

depends on his estimate not only of his -- the intentions of CBS, but the likelihood that CBS will succeed in carrying out those intentions.

THE COURT: I agree with that, too.

THE WITNESS: I think the natural -- there is a certain amount of testimony that said, well, everybody will realize that it is in their interest to go and get their music played on CTN, that they are not going to give up exposure on CTN inorder to make the bypass fail. In the short run if the system were up and going, in the short run it would be in their interest to get the music played on CTN.

But that is balanced in the short runby the fa t that in order for the system to be going they have to incur a certain amount of inconvenience and expense to create the machinery. I think their long term interests are for this not to happen at all. The short run result would be an attitude of wait and see, and that would be reinforced by the fact if some of the big publishers wait and see, they will look around and seeing that the other people are waiting and seeing also, it won't take terribly long for the thing to fail.

Q Does this require any communication among the publishers?

MR. TOPKIS: Does what require any communication among publishers, your Honor.

MR. HPUSKA: What Dr. Fisher just said. It is perfectly clear. The publishers hanging back and waiting.

THE COURT: Well, I don't think we need Dr. Fisher's testimony on that. We can all theorize what human beings would do in such circumstances. They might communicate with each other but we all know that they read the papers or go to lunch at SArdi's and find out what is happening.

Q Do you perceive any way for CTN to overcome this waiting back or resistance that you described?

A I think it is at least possible that if CTN were to pay sufficient money they could bribe at least some of the publishers into participation. I think it is indicative that when Mr. Chiantia testified he talked about yes, he would deal if you made me an offer I couldn't refuse and when he was asked what that came to, he said, in effect, well, let's see what I am getting now. It came out to about 800 or $900 and he said, if you came in with an offer for about $3000, I would deal.

I think it is probably true that CTN, if they

made enough money could bribe the participation of at least some of the publishers but that would be a very large expense.

THE COURT: Would it be larger than worthwhile?

THE WITNESS: Well --

THE COURT: I mean, isn't there a point, a range within which it would be worthwhile?

THE WITNESS: I guess I would like to say two things in response, your Honor.

One is that if the object of doing this is to establish a competitive market with competitve prices to music, it seems to me to be somewhat self-defeating if to do that you have got to go out and pay more than you are paying now, even.

And the other is that the question of when this becomes worthwhile is, I think, again, a question of who is it who ought to be presumed to be the best judge of their own interests.

I observe that the networks haven't done this. I don't -- I take that as confirming the thought that --

THE COURT: I find that argument coming from economists unfortunately in this case, anyway, and I guess unfortunately always, the argument of who is the judge

of the best interests.

Sometimes it is frustrating to me because it seems to me that it suggests that things will never change. You know, that everything today is the way it is because everybody judges his own best interests that way and I don't see how you can ever evolve a new system if that happens.

THE WITNESS: I wouldn't say that the facts that the networks haven't attempted the bypass is in and of itself proof that the bypass, if attempted, would not work.

But I think given all the reasons which I find compelling to suppose that the risk that the bypass would not work is prohibitively high, I will put it less humbly than assuming I don't know better than the networks -- I am pleased to see that apparently the networks executives concur in that opinion.

Q What in your view, Professor Fisher, would be the effect of a bypass on what we have been calling in this case music in the can?

MR. TOPKIS: Your Honor --

THE COURT: Hasn't Dr. Fisher given his views on that on direct?

MR. HRUSKA: Yes, he has, your Honor.

THE COURT: I mean to the extent that you want him to reb ut what other people said, all right.

Is that the objection?

MR. TOPKIS: That is the first half. The second half is that there is at the moment no predicate whatsoever for testimony about music in the car except the wildest guess.

THE COURT: Well, we will have to go on the guesses and see whether they are right or not.

MR. HRUSKA: Just for the record, your Honor, I would like to disagree very strongly on that. I think the record at this point is overwhelming.

THE COURT: I think Mr. Topkis means whether it is sufficiently large in scope to warrant the attention it has received, but that hasn't been demonstrated yet. We will have to go on some assumptions.

Q Mr. Nathan testified about the matter of premiums. Do you recall that?

A Yes, I do.

Q Could you tell me whether you agree with that point of view?

A I certainly agree that in the even of a bypass, the owners of the rights to music in the can will be able to exact some sort of premium for the use of that

music and would in fact exact it.

I think the issue turns on how big the premiums are going to be in part. Both -- I think what Mr. Nathan and Dr. Steiner testified that nobody was going to hold up CTN because if they did so, they would destroy their chances of doing business with CTN in the long run.

But I don't think it is necessary to conceive of this matter as a mad highway man appearing at the CBS building and demanding all the money. All that has to happen is the perfectly reasonable thing, that every proprietor gets a price at the high end of the range which he would otherwise get or gets a small premium, not an unreasonable premium and certainly if enough of them do it, not so high thatit will destroy the relations with CTN, but it is my understanding that in fact there is a great deal of music in the can and a small but appropriate premium paid for a great deal of music could amount to a vast amount of money.

Q Can you think of any economic circumstances in which there might be owners of music in the can or writers or publishers with veto rights with respect to the use of that music where a truly high or exceptionally high premium might be exacted?

A Well, I think one has to ask first the question of what would it cost CTN to do without the music. There was testimony by Mr. Dann referred to by Dr. Steiner that the cost of dubbing out the music was in the hundreds of dollars but that referred only to the mechanical costs of dubbing out the music.

The cost of actually producing so to speak, the new music to go in it is greater than that.

Moreover, dubbing out music is not going to be possible in all situations.

It is hard to imagine that if a rerun of the Carol Burnet Show was in the can, that it is going to be possible to substitute other music for something which has a production number in the Carol Burnett Show. You have got to stage a new production number. It means slicing up the program.

In dramatic series, if a night club scene is part of--an integral part of the plot and the song is going on in the background with pictures of the performer upon occasion,

it is not just a matter of substituting the music. The same scene has to be shot.

In those situations the cost to CBS of not having available the music is very substantial.

It is conceivable that it is so substantial that it is well above what the owners of that copyright, particularly the writers, can expect to earn by doing business with television networks for a very long time.

In that situation it seems to me there would at least be a strong temptation to the writers to try and hold up CTN for essentially the full replacement cost.

Q In your judgment, Professor Fisher, does a rational businessman voluntarily place himself in that position?

A I think Mr. Nathan said that rational businessmen don't place themselves in a position where they have to deal only with a single source of supply. That's the sort of position we are talking about now with a vengence. I don't think it would be rational for CBS to put themselves in positions where they might be facing those demands or indeed to put themselves in a position where they might be facing hundreds of smaller premiums for larger amounts of music.

Q And do you have any views regarding the extent of any premium that might have to be paid at the outset of a bypass to music publishers for music not in the can?

A Well, I already testified that I think in order to get them to deal one would have to pay somewhat more than they are paying now. I think that's particularly true because a music publisher thinking about dealing with CTN will have to realize in many cases that if the song is performed on CTN he may be losing an opportunity to perform it on--have it performed on another network and he will be giving up what the, is called technically the opportunity cost of that music.

That means that the first place, as with Mr. Chiantia, the first place he is going to think of bargainig for is the present distribution rate and he is going to want, I think in return for dealing and helping to break up the system, a larger premium than that.

Q We discussed before, I think in questions directed by his Honor people like Mr. Brettler and Mr. Morris who gave testimony on the subject of their views with respect to direct licensing of television networks.

Is it possible to draw any economic conclusion from those stated views and the extent of premiums, if any, which publishers who hold those views would want?

MR. TOPKIS: Is the question at an end?

THE COURT: I suppose can't we all agree that the more intensely the personnel holds the view that he doesn't

like the new system the higher anyone of the factors, that it would be one of the factors in relation to the amount of premium needed to require his mode of conduct?

A Well, Mr. Morris said--

THE COURT: There are many other factors it would seem to me that might influence him--how strong his business is, whether he has any personal outside income, a thousand, million things but--

A In discussing the question of whether he would sell options on his work for the future to CTN, Mr. Morris said, I think, he would have to give me enough money to make me comfortable for the rest of my life.

THE COURT: The question is how much is that?

THE WITNESS: I don't know if Mr. Morris is still of the living.

MR. TOPKIS: Happily, your Honor, Mr. Morris is one of the rare individuals in this case who is still alive so perhaps there would be some money involved.

But is this rebuttal and if so of what?

THE COURT: I don't know. In any event, I think I've indicated that I don't really feel that it casts much light on the question.

Q Do you think that it's possible, would be possible for CTN to bypass one of these two licensing organ-

zations at a time, one at a time.

A No. I think it would be quite difficult.

Suppose for example that CTN were to retain its BMI license and attempt to bypass ASCAP. ASCAP members in considering whether to deal would realize that in that situation they are going to be competing against music which is free at the margin and they are going to be at a substantial disadvantage.

That, it seems to me would have to harden their attitude that this is something they don't like.

MR. HRUSKA: Your Honor, I will now be turning to a somewhat different subject. I wondered whether this would be an opportune time for breaking for lunch.

THE COURT: Yes.

How much longer do you think you will be in the examination of Dr. Fisher? I would like to be satisfied that by 5 or 5:30 at the latest,--is Dr. Fisher the only witness you are going to call?

MR. HRUSKA: Dr. Fisher will be the only additional witness we will have, your Honor, yes and my best guess is that we have within one and a half hours. I think that the remainder of the testimony could be complete easily within that time.

THE COURT: If we start at 2, you mean you will be

through by 3:30?

MR. HRUSKA: I think clearly so and possibly 3:15 or even less.

THE COURT: Do you contemplate any substantial cross examination, Mr. Topkis?

MR. TOPKIS: Not up to now, your Honor.

THE COURT: After having that comforting assurance, Dr. Fisher. We will go to lunch.

(Luncheon recess until 2 o'clock p.m.)

2:00 P.M.

FRANKLIN FISHER resumed.

DIRECT EXAMINATION (continued)

BY MR. HRUSKA:

Q Last May, Professor Fisher, you testified that you thought that an attempt by CTN to bypass by first taking a per program license and then trying to bypass on a program by program basis would be impracticable.

Dr.Steiner has given testimony to the opposite effect. Has the point, any of the points made by Dr. Steiner altered your view on this subject?

A No, my view remains the same. Dr.Steiner argued about a point mostly made by Mr. Sipes about the last guy in line holding up the producer but he did not discuss the three major points which I made, which in brief summary were that the per program rate divided by the number of songs was an artificial target around which bargaining would tend to center.

And second, that even if that weren't true, and that one could directly deal for prices below the blanket rate, which I regard as most unlikely, I gave you will remember, a set of computations which showed that the fraction of the time you would have to be successful in direct dealing in order for this to end up breaking even after dropping the blanket license, that fraction would be very

high. And finally, that even if you did succeed in one program, you didn't bring into being a competitive market, you had the same set of hurdles to jump the next time around.

Q Well, would those same points be true in the case of BMI if a lower percentage of CTN programs used BMI music than the percentage of CTN programs which used ASCAP music?

A Yes, it would be true. The reason, I think, goes like this. In the first place, as to the per program rate divided by the number of songs being -- a natural place for bargaining to center, that has nothing to do with the number of programs that use BMI music.

Q That is the target point?

A That is the target point.

The point that is affected by the number of programs which use BMI music is the point that was involved in the calculations about the number of successes you would have to have, but it doesn't make a whole lot of difference for the following reason: If BMI has music on only a relatively small number of programs, then it is in BMI's interest to keep the per program rate well above the blanket rate, farther above than it is in ASCAP's

interest to keep it because otherwise whether there was any bypass or not, everybody would take the per program rate, pay it on the few programs, relatively few programs that use BMI music and no one would take the blanket rate. It doesn't make sense, I think for BMI to do that.

MISS KEARSE: If there is testimony somewhere in the record that BMI music is used on a relatively few number of CTN programs, I am not aware of it.

THE COURT: You said relatively. I don't know whether that is what Dr.Fisher meant or not.

THE WITNESS: I meant relatively fewer than ASCAP.

MISS KEARSE: Is there any evidence in the record as to how many programs use ASCAP music or BMI music?

MR. HRUSKA: There certainly is evidence in the record regarding ASCAP music. Yes, as a matter of fact there is as to BMI as well, right. We did put in evidence last May, your Honor, a compilation of data based upon our printout which does disclose figures on ASCAP and BMI.

The point of this question is really kind of an even if point. I don't understand the nature of the objection made by BMI counsel. This point was even if BMI music is used on a lesser percentage of CTN programs than

ASCAP music, does that lesser percentage affect this analysis. That is the nature of the point that was just --

THE COURT: I will have to study the testimony to understand the significance. Maybe Miss Kearse will. Why did you ask the question posited on the proposition of there being a lesser use by BMI of BMI music?

MR. HRUSKA: In the first case, there is a somewhat lesser percentage in BMI's case. In the second case, BMI yesterday put into --- was it yesterday or the day before, through Mr. Rosenthal, put in this offer that hasn't been received yet, a study based upon one month, March 1972, which had certain percentages on it since I believe the point that BMI has offered this study for goes to the per program area. I wanted to obtain Dr.Fisher's judgment as to whether numbers of the nature shown in the chart or any numbers less than the ASCAP numbers would have an effect on the per program analysis.

THE COURT: With that explanation the testimony is received subject to Miss Kearse's right, of course, to point out that it is based on an incorrect assumption.

THE WITNESS: I am sorry, your Honor. I think I was somewhere inthe middle of the answer and I have forgotten where.

THE COURT: I don't blame you. I thought you finished.

MR. TOPKIS: Would it be possible for the reporter to read back the answer?

(Answer read.)

A I think that does two things. In the first place it makes the artificial target for direct dealing higher so that it reduces the chances of being able to conclude direct deals below the blanket rate. In the second place it means that on the programs in which CTN failed to bypass BMI, it would be paying a relatively higher rate, relative to the blanket rate, than it would as regards ASCAP and that effect essentially washes out the effect of the fact that there were a fewer number of programs to bypass in the first place. The success ratio would still have to be very high.

Q Mr. Nathan and Dr. Steiner indicated their beliefs that ASCAP and BMI were in the same market. Do you agree with that point of view?

A No, I don't.

Q Tell us why.

A Well, the essence of what I said about that last May was that it was not possible for CTN to do without an ASCAP license and it was not possible for CTN to do without

a BMI license, that they were not reasonably interchangeable commodities.

Now, what Dr. Steiner said about this was that if BMI wanted to bid music -- sorry, bid business away from ASCAP, it could be done because CTN could take a per program license from ASCAP and attempt to substitute BMI music for ASCAP music program by program. That is, attempt to switch entire programs out of ASCAP music into BMI music free at the margin under the blanket license and make the substitution in that way.

But it is my view that that, in essence, cannot work, and it can't work for the same reasons that the per program bypass cannot work. Taking the rates for the blanket license and the per program license that were discussed in my testimony last May, namely two per cent and 9 per cent respectively, and supposing, for simplicity that all programs now use ASCAP music, then in order for that to lead to a position where you would actually save money, you would have to reduce the number of programs using ASCAP music to two-ninths. You would have to switch over to BMI 7/9 of the program. That kind of substitution possibility it seems to me simply does not exist between the two repertoires.

THE COURT: Dr. Fisher, perhaps it is unfair to ask you when I should have asked the other -- your other pro-

fessional colleagues, Dr.Steiner and Mr. Nathan, but to what extent do you think that gentlemen in your profession are capable of rendering an opinion as to the interchangeability of music between BMI and ASCAP? Isn't that essentially a question for musical people or show business people? I don't mean to, you know, make light of what you have all said, but I do think it is an important question.

THE WITNESS: Well, I think it is -- that question is a question for show business people because the question of interchangeability is what it is, so to speak, in the eye of the beholder, in this case the eye of the producer, but what I have been talking about is not the substitution of the -- the substitutability of individual pieces, but the substitutability of the licenses, one for each other.

THE COURT: I am glad you pointed that out.

Q Do you think that the prices charged for blanket licenses are a function of usage, music usage?

MR. TOPKIS: Could I have that question back, please.

(Question read.)

MR. TOPKIS: How can this witness possibly know, your Honor.

THE COURT: I don't know. That is what I was about to ask Mr. Hruska, whether Mr. Hruska means to ask him whether in any bargaining for a fee for blanket licensing, you would expect or whether you are asking what has actually happened in the license fees that have been set?

MR. HRUSKA: Well, perhaps the second follows the first. Really what I am commenting on or asking Dr. Fisher to respond to comes from the testimony of Mr. Nathan where he had indicated that he thought that music usage played a role in the negotiations to the extent that it was reflected in blanket license fees and in essence I am asking Dr. Fisher to comment on that or to say whether he agrees with it or disagrees with it, and if he disagrees with it --

MR. TOPKIS: Mr. Nathan had participated in those negotiations and was testifying on the basis of his experience.

THE COURT: Then I will ask Dr. Fisher, understanding that Mr. Nathan has had somewhat more practical personal experience but I would still like Dr. Fisher's view, would you expect that in negotiations in regard to blanket license charges, the degree of useage of music would be a factor in the bargining?

THE WITNESS: I would certainly expect that the parties would talk about it but I would think that the relations between music useage in a past year and a negotiat price in a future year would be tenuous.

THE COURT: Why?

THE WITNESS: Because it is not much, I think, of a bargaining point for CTN. I think the picture one visages in this bargaining situation is that CTN in some year, let us say, uses less ASCAP music than it has in the past and it comes in and it says to ASCAP, look, we are using less music, why don't you reduce the fee.

Well, if all that's involved is direct negotiation between the parties, it is not at all obvious why when ASCAP is negotiating a license for the use of the entire repertoire, why ASCAP should find that persuasive, or if it d where that could go. If it is a question that hanging over that is the threat of a proceeding under the consent decree in which Judge Ryan might find that persuasive, it seems to

me that what's involved there is a threat that if you don't agree to this particular point, we will engage in protracted fairly expensive and uncertain litigation.

THE COURT: Well, I can understand why you consider those to be--if you want to call them negative points but from the point of view of the year, won't the year be likely to pay more if it use or believed that it was going to use more music than if it believed it was going to use less music?

THE WITNESS: Well, the year is certainly likely to pay more. The more valuable it believes music is going to be to it.

THE COURT: Right.

THE WITNESS: Whether that involves an increase in the quantity of music as opposed to a shift in the kind of music that's used is, I think, not clear. But in any case, it doesn't, I think, follow that what a user has been doing in the previous year is necessarily going to reflect what the value of music is going to be in the following year.

I don't doubt for a moment the proposition if CTN thought they were going to use very little music or could do without the license, they won't pay a very high price for it but I think that's clearly not the price.

THE COURT: One of the factors--all right.

MR. HRUSKA: I got so interested in that exchange, your Honor, I forgot what I was going to ask.

THE COURT: Then you can't ask Dr. Fisher because he is on the stand.

THE WITNESS: Your Honor, it was my understanding, the rules Mr. Hruska wasn't supposed to coach me but I thought I could coach him.

MR. HRUSKA: I was going to point out, your Honor, this is not a question, in response to Mr. Topkis' statement that a question was asked on direct examination of Mr. Nathan seeking to obtain a response concerning the degree to which he had participated in some negotiations. Objection to that question was sustained and the matter was not covered on cross examination.

Q Now, Professor Fisher, does the fact that negotiations occur between the years of music, for example, television network son the one hand, and ASCAP and BMI on the other hand, indicate as a matter of economic reality that ASCAP and BMI do not have power over price, monopoly power over price?

A It doesn't indicate any such thing, no.

You see, any good monopolist wants to know the demand curve of his customer. He wants to know, in effect, what the market will bear. Mr. Nathan testified that

ASCAP charges CTN what the market will bear and he said if they didn't, he thought the members ought to change the management.

Negotiations take place in part, I presume, so as to test out the position of the other party and find out what the market will bear. Competition is among competing sellers, not competition between buyer and seller.

Q Mr. Marks testified that there was no deferred competition under the ASCAP Four Fund System. And there have been other statements made in the case by counsel to that effect.

Do you agree with that point of view?

A No, I certainly don't.

A writer who chooses the Four Fund System instead of the current performance system gives up income that he could have in respect of current performances and amasses credits which will do him good in later years. It is true that in later years the money which he gets is not fixed. It depends on the size of the ASCAP pie to be divided up in those years and that pie consists of money paid for performance, possibly of other people's works in that year, but a man who goes to the Four Fund System is giving up money now in exchange for getting money later. If that's not dferred compensation, I don't know what is.

Q Mr. Steiner and Dr. Nathan testified that the present system is competitive one because a great deal of non-price competition takes place. Do you agree with that?

A No, I certainly don't. Non-price competition is just not a substitute for price competition.

As a matter of fact, as Dr. Steiner wrote in his textbook and agreed to the other day, there is a general tendency--

MISS KEARSE: Your Honor, I object to reading from textbooks. Dr. Steiner was here, was cross examined, from quoting--

THE WITNESS: I am not quoting from the transcript.

THE COURT: I understand Dr. Fisher intends to quote, I don't know whether he has memorized it or not; do you have the book you want to point out the pages?

THE WITNESS: I will be content with the line in the transcript where he was asked if he agreed with it.

THE COURT: We will refer to the transcript.

MR. HRUSKA: T.R. -- transcript 4467.

"Question. Do you agree, Dr. Steiner, that non-price competition will tend to be more vigorous the greater the limitation on price competition?

"Answer: That sounds familiar, Mr. Hruska. I

think other things can equally, which is probably the caution I put in when I wrote that, that I agree with that statement.

"Question. Are you likely to find, then, a situation where quality competition in a particular market is greater than it otherwise would be because the sellers in that market have agreed to fix prices?

"Answer: I wonder if I could hear that question repeated.

"(Question read.)"

"Answer. I think that to the extent there is a lack of price competition for whatever reason, whether due to regulation, to price fixing, to other reasons, wherever that is so, the competitive instincts of rival sellers will come out and quality competition, service competition, other forms of non-price competition will tend to be more intense.

THE COURT: Question him on the basis of that testimony. Would you comment on Dr. Steiner's testimony?

THE WITNESS: I think that's quite right. I think that's a well recognized view, well recognized among economists.

THE COURT: You mean to the extent that price competition declines, other forms of competition will assert themselves?

THE WITNESS: That's correct. And I think to answer the question whether those forms are going to be a substitute for price competition, one need only ask the question, suppose that the major automobile manufacturers joined in a price fixing conspiracy but continued to compete vigorously on promotion, advertising and design of cars. We won't suppose, I think, that the consummer got the benefit of competition in the same way as if they competed on price.

Q Why?

A Well, he would be deprived, for one thing, of the opportunity of buying a car cheaper. He would be paying the extra costs to the extent that the restraint on price lead to further competition along these lines, he would be paying the extra cost of the advertising and the promotion.

Q In terms of the goals of an economic system which you described last May, does--do these areas of non-price competition achieve those goals?

A Well, they are better than no competition to achieve those goals but they don't replace prices. The The fundamental set of propositions about the allocation of resources is--contains the indespensible role that prices play as signals to consummers, users and producers

in that allocation.

Q Now, Mr. Nathan testified that the present system assures an orderly flow of music out put to the market. Dr. Steiner testified that the present system is efficient because it saves substantially in negotiating and transaction costs and that it has been chosen by the participants as more convenient than direct dealing.

Do you agree with those views?

MISS KEARSE: Your Honor, I would like to object to that question. I believe that the testimony related to the blanket license rather than to the present system in its totality.

MR. HRUSKA: Be perfectly happy to accept that amendment, your Honor.

THE COURT: All right.

THE COURT: Well, I certainly agree that the present arrangements and the blanket licenses are conducive to an orderly flow of music to the market but as both Mr. Nathan and Dr. Steiner agreed, and as I testified last May, that has nothing to do with the question of whether or not charges for music are made on a useage basis or on a blanket basis.

Those conveniences have something to do with access to the entire repertoire instead of parts of it but not with the way that access is charged.

Now, as to whether in fact the present system is efficient in the sense of minimizing transaction costs and so efficient that it overcomes the negative allocation of resources effect due to the absence of price competition, with that I must disagree.

In the first place, the transaction costs involved in, let's say, a per use system, are not, in fact, very high.

There will be some initial set up costs until the machinery is set in operation. After that, what we're talking about is leaving names in the computer system, dickering for performance rights at the same time the call is made for synchronization rights and so forth. Those transaction costs aren't very great. I think on the issue of whether the blanket license system reveals the preference of the participants, I think there is no doubt that it reveals the preferences of ASCAP and BMI. If it really is much more efficient than alternative arrangements, then presumably that system would emerge as the result of a situation in which choices such as per use were made available.

I think the reason that the blanket license system survives is basically the reasons I stated before, that the blanket license system operats in such a way as to make bypassing impractical as a way of bringing about direct dealings

MR. HRUSKA: Your Honor, the remainder of the direct examination of Professor Fisher will be addressed to the charts that Mr. Nathan testified about the other day and Mr. Baker will conduct that examination. I wonder whether we need a little time--would there be any possibility, your Honor, of having a brief recess so we could set up the charts.

THE COURT: All right.

MR. BAKER: Also, your Honor, I think it would be more convenient if we could have the witness sit here facing the charts.

THE COURT: All right.

(Recess.)

MR. HRUSKA: Your Honor, before we commence with the charts, it was called to my attention during the break by Mr. Sondak, if I may just spend 30 seconds on it.

There are three places in the transcript last May where the parties had been unable to agree on corrections. The transcript of Dr. Fisher's testimony. I thought while we had Dr. Fisher here, we could very quickly get him to look at those portions and make the necessary correction if he feels they are necessary.

BY MR. HRUSKA:

Q The first page is at page 1655. I would ask Dr. Fisher to look at that line.

Beginning at line 10, and if there is any correction that you feel should be made, could you so indicate on this record.

A The problem is in the punctuation. On line 10 there should be a period after the word "rights", and the word "with" should begin a few sentences which indeed begins the next paragraph.

On line 11 the period should be a comma and on line 12 the word one should not be capitalized so that the sentence reads "With buyers who want to buy and sellers who want to sell, one would expect that" and so on.

Q The next one occurs at page 1692, line 18.

A The word "television" in line 18 should be "situation".

Q And the last one is at page 1724, line--beginning at line 8.

Q Page 1724.

A Would it be just as simple if I just read the paragraph the way I think it should go? I think the answer should be:

"Well, I think that that would mean that ASCAP and BMI would find it in the interest of their members when proposing a per program license to propose one at a reasonably high rate" and then the only other change is on line 12 where the line should read, "We haven't actually gotten into yet."

MR. HRUSKA: That's all I have.

xx BY MR. BAKER:

Q Professor Fisher, just by way of a very brief review, would you describe for us your qualifications in the area of statistics?

MR. TOPKIS: They are conceded, your Honor.

THE COURT: Can't Professor Fisher give us some kind of syllabus if you want--time is so valuable--

MR. BAKER: I am talking about 30 seconds, your Honor.

THE COURT: All right, we will take 30 seconds.

THE WITNESS: I teach econometrics which is the business of the application of statistics to economic phenomena. I am a fellow and a council member of the Econometric Society and the editor of its journal. I have been associate eidtor for the Journal of the American Statistical Association and I have done a good deal of empirical quantitative work in the analysis of individual markets and industries.

Q And, Dr. Fisher, were you present last Wednesday when Mr. Nathan testified concerning charts which were offered in evidence?

A Yes, I was.

Q In your view, was there anything in the computati of the amounts received by ASCAP and BMI, ignoring for the moment what the charts mean, that is in itself misleading?

A Yes, I do.

It is my understanding that as of about 1969, the data on those charts are unreliable because they do not adequately reflect a number of things.

In the first place, there was dispute as to what fees would be due for those years.

THE COURT: The years prior to '69?

THE WITNESS: No, I mean the years 1970, '71 and

'72.

THE COURT: All right.

THE WITNESS: Some of those disputes, I gather, are outstanding with only interim fees fixed. One of the disputes ended with the payment of--by NBC to BMI of $10,000,000 in respect to years running up to, I believe it is 1976, but including the years back to, I think it is '71. Those figures have not been allocated to the years which appear on Mr. Nathan's chart and by whatever unknown amount it is that should be allocated to 1971 and '72, the --the chart is too low for those years. This is not the same as the matter of allocating backwards the stuff before 196 .

In addition, there is still I gather outstanding dispute as to what those fees will be. I don't think it can be presumed that the interim fees are the fees which will ultimately be settled. I think all that one can assume, particularly in the presence of litigation, is that those fees are not so terribly different from fees in the past as to be outrageous to either party.

Finally, of course, 1969 saw the commencement of this lawsuit, at the end of 1969 and I gather the commencement of other litigation and I--one can only speculate on whether the fees would or would not have been different in the absence of the litigation. I think it is particularly

important because if one looks at the graphs--

THE COURT: You are talking about Mr. Nathan's graphs?

THE WITNESS: Yes. And it is frankly my opinion that I don't think the graphs say anything anyway but if one looks at those graphs, a good deal of the action occurs in the period '69 through '72.

In AX 294, up on the left, perhaps you could uncover those years.

MR. TOPKIS: Your Honor, is this a summation? I respect Dr. Fisher but I don't understand that your Honor needs a lecture on how to read a chart.

THE COURT: He is not telling me how to read a chart. He is telling me what he things the weakness is in the factual material displayed on the chart. I don't agree with you, Mr. Topkis. Provided we finish this afternoon, I will listen to almost anything.

MR. TOPKIS: I will keep that in mind, your Honor.

THE COURT: Well, all I was going to say is that up to its--it is after '69 that there is a drop in the chart. We don't know by what amount that ought to be raised

THE COURT: I understand.

Q Dr. Fisher, before we go to the analysis which

Mr. Nathan presented, in the various charts arranged around the room here, there are two kinds of figures which have not been previously presented in this courtroom.

One, are the CBS payments to ASCAP and the other would be ASCAP collections from the three television networks for the period 1962 to 1969.

Where those figures are presented, can you just very briefly state for the record the manner in which lump sum payments were allocated?

A They were allocated in accordance with the order, the 1971 order in the case of the United States and ASCAP as in proportion to the way the CBS payments to ASCAP were allocated.

Q Thank you.

Directing your attention to AX 294, the chart comparing the indexes of gross advertising revenues with ASCAP and BMI collections.

I believe last Wednesday Mr. Nathan testified that the patterns set forth on this chart were inconsistent with ASCAP and BMI having no monopoly power. What is your opinion as to this?

A Well, I don't think that one can draw any inferences whatsoever about monopoly power from this chart or charts like it.

What the chart shows is two lines of which, as it says, the top is gross advertising revenues received by the television networks and the bottom, of course, is the ASCAP and BMI collection line.

Well, gross advertising revenues received by the networks say something about the market for network advertising but they don't say anything about the market for music with which this case is concerned.

It is true that what is shown growing fast is gross advertising revenues. That, without further information is consistent with a great many things. It is consistent, for example, with the possibility that the number of commercial minutes sold by the networks went up during that period.

It is consistent with the possibility that the-- that television became a more effective media and that advertisers wanted more--were more anxious to have television exposure than exposure in other media.

It is consistent with the view that the networks were providing not more minutes to advertisers but in some sense better minutes or more costly minutes to advertisers and in this connection let me point out that one of Mr. Nathan's other charts, like several of them, have on them average weekly earnings, I think it is, of workers in motion

picture production. That goes up pretty fast. That's an index of costs in the motion picture industry. Many of the same sorts of people work and indeed the same studios preparing programs for television. One view of why gross advertising revenues go up is that the cost of workers in the television industry, in entertainment production is going up.

The point about this is not that I know that any of these things is the case but that it is simply not possible to look at that chart and to say that that has anything-- that one can say why it is going up, even as regards the relationship of the network and its advertisers, so much less can one say that it has anything to do with the relations of the networks to ASCAP and BMI.

Now, in fact if it had anything to do with the relation of ASCAP and BMI to the networks with a measurement of ASCAP and BMI monopoly power, one could then generalize the principle on which that is drawn and reach a number of conclusions, which I think one would not want to reach.

I would like to demonstrate that, if I may, with these other charts that have been prepared, but I think I ought to say in advance that it is not my contention that these charts prove anything whatsoever about monopoly power--

THE COURT: Your own included?

THE WITNESS: My own included. About monopoly power--

THE COURT: I didn't ask that facetiously. This is a method by which--

THE WITNESS: The method which I am about to adopt is to show, I think, that if one is willing to draw those inferences from Mr. Nathan's chart, then it is possible to prove almost anything and let's start with PX 939.

THE COURT: What's the number of the Nathan chart?

THE WITNESS: AX 294.

THE COURT: Thank you.

THE WITNESS: On PX 939 are plotted for the years for which good data are available--

THE COURT: That's the one behind the witness chair?

THE WITNESS: That's the one behind the witness chair.

Gross advertising revenues, ASCAP and BMI collections, that's the bottom line and in the middle is ASCAP collections alone from the three networks.

If the divergence between gross advertising revenues and ASCAP and BMI collections is supposed to show

some measure of the lack of monopoly power, then I think one would have to conclude from PX 939 that ASCAP by itself has more monopoly power than ASCAP and BMI put together and that's not an impossible conclusion but it would have to be the case for that to be true, that ASCAP is in a separate market from BMI, something which I believe to be true but which Mr. Nathan doesn't.

A similar thing is shown in PX 938 in which what is graphed--over on the easle, which was graphed is the same as before except that it is CBS payments to ASCAP.

THE COURT: Instead of what?

THE WITNESS: Instead of ASCAP collections from all three networks.

THE COURT: All right.

THE WITNESS: On this version if Mr. Nathan's inference is correct, presumably that original line, that's the CBS payments to ASCAP, is not inconsistent with monopoly power and again, presumably it means that ASCAP has more monopoly power than ASCAP and BMI combined.

THE COURT: I don't understand how you reached that last conclusion.

THE WITNESS: It is Mr. Nathan's--as I understand Mr. Nathan, he is saying the fact that the gross advertising revenues diverge upward from ASCAP and BMI collections is

inconsistent with monopoly power.

Well, gross billings revenues does not diverge upwards from ASCAP and BMI collections--sorry, gross advertising revenues does not diverge upwards from CBS payments to ASCAP by anything as much as it diverges upwards from ASCAP and BMI collections.

So if that were a measure of monopoly power, I think that inference would follow. What's more, lots of other things will follow.

Consider for a moment the United Shoe Machinery Company which we know--

MR. TOPKIS: If your Honor please, at this point I rise to suggest that we can consider almost anything under your Honor's most recent ruling but please, not the United Shoe Machinery Company?

THE COURT: I would be reluctant to get into a discussion of that case. Your purpose here, it seems to me, is to comment on the meaning or lack of meaning of those charts and I should think you would be able to do pretty well with a demonstration of those facts.

THE WITNESS: It seems to me if Mr. Nathan's method is appropriate, then it is a generalizable method and I have just two remarks about two other industries to show in fact it is a ridiculous method.

THE COURT: Let's go ahead with these and see whether I feel the need for any further testimony is necessary.

THE WITNESS: Well, if a monopoly can keep forcing the price upwards, then it ought -- one thing we ought to expect is that its profits are going to grow at a time when its customer's product is growing. PX944 shows --

MR. TOPKIS: Now we are back in the United Shoe Machinery case, your Honor. I thought your Honor --

THE COURT: I don't see how we can assume this is United Shoe Machinery. You mean it is another industry?

MR. TOPKIS: PX944. It is labeled United Shoe Machinery.

THE COURT: Mr. Baker, what is your offer of proof?

MR. BAKER: My offer of proof is that they offered documents which indicated that if the collections or the profits of ASCAP didn't go up as rapidly as other indices, that this was inconsistent with the possession of

monopoly power. I have two companies here which were adjudicated to be monopolists and it seems to me the relationship between their earnings or their revenues to the price of their produce and other indices would, if Mr. Nathan's testimony is correct, also indicate that those companies were not monopolists.

THE COURT: I take it these facts are a matter of public record ofwhich I could take judicial notice, is that correct?

MR. BAKER: The facts -- the figures set forth on the chart come out of, with respect to net earnings, come out of United Shoe Machinery's 1960 annual rsport and the gross national product figures I believe come from the Department of Commerce.

THE COURT: I can't remember when the litigation occurred, but I wonder whether it covered that period.

MR. BAKER: 1960.

THE COURT: I don't see how --

MR. BAKER: Those run from 1943 to 1953, ten years prior to the adjudication. '43 to '53 and this was the year in which they were adjudged to be monopolists.

THE COURT: Did you say they came out of the 1960 report?

MR. BAKER: We went back and the data was in

the 1960 report.

THE COURT: All right. I thought it had to do with 1960.

Miss Kearse?

MISS KEARSE: As I recall, your Honor, CBS objected to its own annual reports being offered in evidence. I don't see how it can be legitimate to offer charts based on some other company's annual reports that isn't even a party here.

THE COURT: I don't recall that the question was the accuracy of the evidence in the CBS report. The question was whether there was any point inputting them in or whether they were irrelevant. If I am willing to hear this kind of testimony, I don't think we should quibble unless there is some reason to believe or you can, if you want later, check the figures and if there is any reason to doubt them, let me know. The real question is raised by Mr. Topkis, whether it is relevant or irrelevant. I am unable to say. I will listen to it.

THE WITNESS: Well, one thing we ought to expect, I think, is that a monopolist's earnings would go up at a time when his customers' product in general was going up. PX944 shows the net earnings after income tax of the United Shoe Machinery Corporation for the last ten years

before it was adjudicated a monopolist and that is graphed against the gross national product. The point of that being to show the economy was climbing at a very high rate during this period. The net earnings trend generally downward whereas the economy, as I say, is going up.

I think if Mr. Nathan had looked at that graph, he might have said that that was inconsistent with the United Shoe Machinery being a monopolist.

After Mr. Nathan testified, it occurred to me that I had once written a book which contained an analysis of the demand for aluminum ingot and since I was staying at my parents, I had available to me a library of mycollected works and I therefore went to the book and extracted some data on the aluminum industry in the years before World War II.

MR. TOPKIS: May I just note my objection, your Honor, to this testimony.

THE COURT: Yes, Mr. Topkis. I know that everybody that has spots doesn't necessarily have chicken pox.

MR.TOPKIS: I bow to your Honor's ruling, of course.

A I looked to see whether the aluminum company, at a time when the economy was climbing, was, in fact, able

to keep raising the real price of aluminum ingot and I discovered somewhat to my surprise that it wasn't. What is graphed in the bottom line of that graph are the years 1932 to '40, is the price of aluminum ingot divided by an index of the price of other metals. What is graphed in the top line is an index of -- Federal Reserve index of durable manufacturing output, that representing an index of the outputs of the customers of the aluminum company, and at a time when the customers apparently were getting better off and better off in terms of output and presumably revenues.

The price of aluminum ingot was declining. I think on approximately the same basis as Mr. Nathan's testimony on AX294, one ought properly to conclude from that that the Aluminum Company of America was not a monopolist during this period.

THE COURT: And the lesson to be drawn from all these charts is merely not that these companies are or are not monopolies, but you can't prove it that way?

THE WITNESS: That's right. I think Mr. Nathan's AX294 shows exactly what it purports to show, namely, the gross advertising revenues with what is on the line and that ASCAP and BMI collections, ignoring the data problems,

are on the bottom line. That is all that can be inferred from them.

Q Dr. Fisher, Mr. Nathan also presented some graphs comparing average ASCAP distributions for writers in various classes as well as ASCAP distributions for all writer members receiving distributions to such things as per capita personal income, weekly earnings of non-supervisory people in motion pictures and weekly earnings for non-agricultural workers.

Would you tell us what you think those graphs show?

A Yes, I think those graphs show --

THE COURT: We are not referring to anything that is here?

THE WITNESS: No. Those are three of the charts used by Mr. Nathan.

THE COURT: That is all right. I understand. 300, 310 and 311. I just wanted to be sure what you were referring to.

THE WITNESS: I think what those charts show is that the number of ASCAP writers in each of those classes, that is, number of writers receiving some distribution or a number of writers receiving $5000 in distribution

or a number of writers receiving $10,000 in distribution, those numbers were rising. That is not surprising that those numbers were rising because Mr. Nathan testified that there is free entry in this system and indeed there is under the ASCAP consent decree there is free entry into ASCAP. Not the same as free entry into competition in the music market.

In PX950, there is graphed total distributions received by ASCAP members receiving over $10,000. The number of such members and the average distributinn.

It is apparent that the total goes way up and the reason that the average distribution doesn't go shooting way up is that the number of members in that class also goes up.

The PX948 shows a similar thing even more strikingly, of course, for, in terms of distributions for all ASCAP writer members receiving some distribution, that is the one onthe end of the blackboard, and PX949 shows the same effect for members receiving over $5000, that is the one next to the witness stand.

Now, the thing about it is that it has nothing to do with the monopoly power in the music market how many writers there are who are, so to speak, sharing the spoils.

The question is, what prices -- what is the power of ASCAP over the price which it receives for music, not how many people share the results of setting that price. In fact, under the blanket license system in the ASCAP consent decree, it has to be open to --

THE COURT: I understand.

THE WITNESS: -- to writers. And what one wants to know is the following, I think:

You see, one wants to know really whether the price that CBS is paying for roughly the same service is going up relative to other prices.

THE COURT: Roughly the same servic per year?

THE WITNESS: Roughly the same service per year. It is hard to say what roughly the same service per year means and I am not pretending that I can say it. One thing I can say is that it is a matter of indifference to CBS whether the music which it uses happens to be written by a great many writers or happens to be written by a relatively small number of writers and it would seem to me to be much more sensible to plot on these graphs the total payments by CBS to ASCAP against the weekly earnings and per capita income figures plotted by Mr. Nathan. One way of looking at it is to say suppose ASCAP membership were closed, then the same group of people would be providing the service and

we could look at what they were getting.

Well, PX935 does just that. That is the one that is now on the top of that easel. It shows ASCAP collections fromCBS as the top blue line and the other data are the data plotted by Mr. Nathan per capita personal income, weekly earnings, motion pictures, weekly earnings, non-agricultural workers and of course, average ASCAP distribution.

And on this basis it is clear that ASCAP collections from CBS is going up at least as far as the other items showing that ASCAP as a group was getting better off relative to, for instance, non-agricultural workers. Or at least it would show that if I thought this kind of analysis either from me or Mr. Nathan showed anything whatsoever.

A similar thing is on the end of the blackboard in PX934, the difference is that there the blue line shows ASCAP collections from ABC, NBC and CBS and about the same inference or non-inference, if you will, can be drawn.

Finally, PX932, which is over the last left-hand one, shows ASCAP collections from CBS plotted against the consumer price index and when it stops moving we will see that ASCAP collections from CBS go up considerably faster

than consumer prices.

THE COURT: I understand. I do understand.

MR. BAKER: I have no further questions at this time, your Honor. I would simply like to offer the charts and maybe I should just read the numbers into the record. The papers on which the computations were made, in case anyone ever wants them, PX932, PX934, PX935, PX936, PX938, PX939, PX944, PX948, 49 and 50, and PX954.

THE COURT: Does that conclude the papers?

MR. BAKER: No. I think maybe the easiest thing to do is to hand the reporter a set of the papers and let him copy thenumbers in. Copies have already been given to ASCAP and BMI this morning. I assume ruling will be reserved. They are not offered for the truth of the material set forth in them except to the extent they are previously supported by the record.

MR. TOPKIS: Your Honor, we have some objection, of course, as to the cutoff date of 1969, but -- and we would like an opportunity to check the calculations but I am certain that we can agree with Mr. Baker on any corrections which may be appropriate.

Other than that I have no objection.

THE COURT: Miss Kearse, will that take care

of your position too, or is it different?

MISS KEARSE: I don't see any BMI license on those charts. I suspect if they were entered, they would be fairly interesting.

MR. BAKER: There are some ASCAP and BMI combined lines.

THE COURT: This is in refutation of Mr. Nathan.

MISS KEARSE: There are lines showing combined collections of ASCAP and BMI.

THE COURT: Nevertheless, the total purpose of the new charts offered by the plaintiffs is solely to refute the ASCAP testimony and I will regard it in that way. I will receive it for that limited purpose.

(Exhibits PX940, 941, 942, 943, 945, 946, 947, 948A, 951, 952, 953, 955, 956 and 957, received in evidence.)

xxx

(Recess.)

CROSS-EXAMINATION

BY MR. TOPKIS:

Q Dr.Fisher, the last time we conversed with each other at this range, you told me that you had never theretofore talked with any songwriter composer or publisher. Do you continue in that innocent state?

A Yes, I do.

Q You testified before that you had never heard of the song Misty, is that right?

A That's right. Except in the transcript.

Q Except in the transcript. Can you -- and you testified something about unique compositions, do you remember that?

A Yes.

Q Can you name three for me?

A Relatively unique compositions.

Q Relatively.

A I can name more, I think.

Q We will start with three.

A White Christmas.

Q White Christmas.

A Happy Birthday. You knew I would say that. Take Me Out to the Ballgame.

Q Take Me Out to theBallgame is unique or relatively

unique?

A It is certainly unique, useful in situations where the plot revolves around a base ball game. I believe there is testimony in one, I think either Mr. Morris' or Mr. Brettler's deposition about negotiation for movie performance rights for that song. Mr. Vogel said there is only one Melancholy Baby. He is a publisher. He ought to know.

Q He is the publisher of Melancholy Baby?

A I believe so.

THE COURT: He is the judge of his own best property.

Q How many songs wouldyou guess there are in the ASCAP index of performed works which involve the term "baby"?

A Quite a few, I should think.

Q And I suppose you would say also that there are quite a few that involve either Melancholy, Melancholia, or something like that?

A I would suppose there are fewer of these.

Q We can start with Gloomy Sunday and go on from there. In any event, Melancholy Baby is a ballad?

A Yes.

Q You have heard it?

A Yes.

Q Tell me, please, the circumstances in which you would think it difficult to substitute another song for Melancholy Baby?

A Well --

Q Other than at Jerry Vogel's ninth year birthday party.

A It was hewho said there is only one. I would suppose if a particular performer wanted to sing it, it might be quite difficult.

Q But that is the only circumstances in which songs like Melancholy Baby have the slightest degree of uniqueness?

A That is the only one that comes to mind about Melancholy Baby.

Q And actually, you have no -- by the way, you say White Christmas is terribly -- relatively unique?

A Yes.

THE COURT: Do you consider uniqueness in terms of a song being popular or sought after or related to a particular time or esthetically because of its quality of composition or all these things or what?

THE WITNESS: I think it depends on the circumstances, your Honor. It would be all these things. I think White Christmas is unique in the sense of having few

close substitutes at Christmas time on the Bing Crosby Show.

THE COURT: Like Silent Night is also unique at that time of year?

THE WITNESS: That is right. That is not identified with a particular performer.

Q Can you think of any other song so identified with a particular performer as White Christmas?

MR. HRUSKA: Your Honor, let me object at this point. Dr. Fisher has not purported to be a musicologist and I think that the points Dr. Fisher has made are points which an economist can make even though he is not a musicologist, namely, there is a spectrum of interchangeability among compositions and at the upper levels of that spectrum, standard compositions can be in the market place considered more unique commodities or middle commodities than more interchangeable compositions.

THE COURT: I am quite aware that Dr. Fisher hasn't purported to be a musicologist, any more than the other economists, but the testimony as I brought out myself from the economists has stressed the significance of the interchangeability factor and I think it is quite in order for Mr. Topkis to explore what Dr. Fisher's concept of that is.

THE WITNESS: Well, Thanks for The Memory is identified with Bob Hope.

THE COURT: Very good.

THE WITNESS: Thank you.

THE COURT: My Man is associated with Fanny Brice, perhaps.

THE WITNESS: I am afraid that is a little before my time.

Q Miss Brice is no longer available for booking so it is all right.

THE COURT: O Solo Mio was associated with Caruso, maybe.

Q Would it be fair to summarize your testimony this way, Dr. Fisher: To the degree, if any, that songs possess relative uniqueness, that would be a factor considered in the bargaining for such songs if the bargainers knew about that fact?

A Yes.

Q Did I understand you to say that Mr.Brettler had said that he would not deal directly with CBS because it would lead to self-annihilation?

A I think he was asked how he viewed direct licensing in general, but -- I know I said this morning he said that about direct dealing with CBS he may have said

that about the question of what would happen if ASCAP and BMI were enjoined from licensing television networks altogether. In either case I would draw the same inference

Q Well, he said that if there were direct licensin he would deal, isn't that your recollection? And he thought the consequence of that would be cutthroat competition?

A I don't recall explicitly --

Q Well, if he said that, would that affect your view of his likely behavior?

A Oh, I think Mr.Brettler when the moment came would think very hard about the self-annihilation aspect and consider the question whether he wants to deal right away.

Q Right. And if he saw others dealing, wouldn't you expect him on the basis of his testimony to jump in and get what he could?

A I think it is true that if a large number of the significant publishers were to deal, the few holdouts, assuming that there weren't enough of them to stop the system that if there were a few holdouts, they would then want to, indeed, jump in, but the amount of waiting involved in this is not, I think, a very, a matter of a very significant amount of time.

THE COURT: I don't follow that last statement.

Do you mean by that you don't think it is important or you think that there isn't much time to wait before the waiting would cause destruction, economic destruction?

THE WITNESS: No, I think the amount of time that publishers would have to hesitate before the bypass failed would be rather -- relatively short.

THE COURT: All right. I understand what he means. Do you not understand it or are you disappointed?

MR. TOPKIS: That particular reading of those particular words rather surprises me, but human communication is fallible.

Q Do you happen to recall, Dr. Fisher, that Mr.Brettler was one of the first people who dealt with 3M?

A Indeed, I do.

Q Does that cast any light in your judgment on the likelihood of his dealing with CBS if he were asked?

A Oh, I think that it shows is that Mr.Brettler is one of the most likely publishers to deal and when I discover that even he thinks of that situation as self-annihilation, I regard it as much -- as evidence that the publishers who didn't deal with 3M are going to think,you know, several times again before dealing with CBS.

Q But it was Mr.Brettler's testimony, I put it to you, that he would deal with CBS. Does that change your view?

A No, I think when the moment came, Mr. Brettler would think about whether he wanted to do it and how long he wanted to wait before doing it.

Q Now, you say that this would all happen very quickly, CBS would try and fail in a matter of a very brief time, is that right?

A I think it depends what you mean by very brief. A short time.

Q Tell me what you mean by a short time?

A Well, not more than a couple of months. Possibly not more than a month.

Q Are you telling us, Dr. Fisher, that if CBS came to you and said, Dr. Fisher, please figure out a way for us to accomplish direct licensing of musical compositions, you would feel totally helpless?

A Mr. Topkis, I am not a lawyer and I suppose it is not open to me to suggest answers to this lawsuit.

Q But you are a consulting economist. I am asking you as a consulting economist whether you don't think it is within your resources to figure out some way to solve this

problem.

A No, I don't. I don't think I could tell them how to do it in a way that they or I would regard it as a reasonable risk for them to take.

Q And you regard it also as quite inappropriate for CBS to think of rises or declines in its use of ASCAP music as a significant factor when it bargainswith ASCAP for a blanket license?

A I didn't say it was inappropriate for CBS to say it. I said the result of their thinking about that would be only a very tenuous connection between the music used and the price paid. I might point out --

THE COURT: You are talking about a blanket license?

THE WITNESS: Yes. I might point out in that connection, if one looks at the three television networks and the amount of credits earned with respect to performances on those and then looks at the payments made by the three television networks to ASCAP, that it is, generally speaking, not the case that the payments per credit earned are the same on all three television networks, indeed they can diverge quite widely, suggesting that the different amount of uses on the three television networks do not result in proportionately different payments under the

blanket license.

Q Do you have any idea -- you know Mr. John Appel?

A I do.

Q He is an attorney employed by CBS?

A He is certainly an attorney employed by CBS. I don't know his exact title.

Q Do you have any idea how often Mr. Appel has filed affidavits in this courthouse suggesting that ASCAP's rates should be lowered by reason of decline in CBS's use of ASCAP music?

A No, I do not.

I can't remember whether Mr.Green has done that or not, so I won't put the question to you.

MR. TOPKIS: We have no further questions.

Thank you, Dr. Fisher.

MISS KEARSE: No questions.

MR. HRUSKA: I have just one, your Honor.

xx REDIRECT EXAMINATION

BY MR. HRUSKA:

Q Do you recall, Professor Fisher, a portion of Mr. Brettler's testimony on deposition in which he was asked, in effect, to compare risks the ASCAP system posed by the 3M bypass on the one hand, and posed by a CTN bypass on the other hand?

A Yes.

THE COURT: Are you trying to bring out Brettler's testimony?

MR. HRUSKA: I am about to ask a question of Dr. Fisher on that point, your Honor.

THE COURT: All right.

Q What relationship is there between that testimony, if any, between that testimony and your views concerning Mr. Brettler's attitude toward a CTN bypass?

MR. TOPKIS: I object to that question, your Honor.

THE COURT: I will sustain the objection. I think I have thoroughly understood here but I would expect that Dr. Fisher's view in the light of what he has testified, that the louder somebody screams, the more likely he believes

it is that they will not cooperate in a bypass, is that correct? Maybe I was over simplifying it. I understand the implication of your question. It is Mr. Brettler thought that direct licensing would be a much more serious threat than cooperating with 3M and on the basis of that you would be likely to think that he would be less likely to cooperate in a direct licensing situation.

MR. HRUSKA: The only reason I brought it out, your Honor, is because of the references to the deposition and I believe the one point at which Mr. Brettler specifically addressed himself to the proposition is where he used the phrase grains of sand compared to watermelons, on this precise point.

We have no further questions for Dr. Fisher.

THE COURT: Thank you, Dr. Fisher.

(Witness excused.)

THE COURT: Do you have any further witnesses, Mr. Hruska?

MR. HRUSKA: We have no further witnesses on rebuttal, your Honor. With the only exception or caveat I might mention here would be there are a number of loose ends on the record, as we are all in this courtroom now aware.

Some of those loose ends pertain to ASCAP and BMI's defense case.

I do not now anticipate that it will be necessary to call any further witnesses when one of those loose ends becomes a resolved matter but I would, just for record protection, like to reserve that possibility.

Also, your Honor, there are--there is a possibili that we will have some small number of documents on rebuttal. Certainly some of the items that have been expressly left open on the record may cause the need for some rebuttal documents.

There is also a problem which we belatedly awoke to last night which is that Mr. Hansen, in examining Dr. Southworth, who your Honor may recall was our computer expert--

MR. TOPKIS: He discovered it won't work?

MR. HRUSKA: Mr. Hansen discovered that he had not actually offered into evidence the charts used by--charts and related documents, I think, used by Dr. Southworth in his examination and obviously we would like to do that.

With these collections of loose ends, some of which I could recite at the moment, some of which I probably could not remember at the moment, I wonder, your Honor, whether we could propose that within a short period of time at least we would designate the other sides, the defendants, allow them to register their objections to any small number

of rebuttal documents we have that we would be able in the next few days to know we have and then, of course, we could take the other loose ends as they arise, for example, the ASCAP computer study, the one or two other things that were mentioned such as our collection of consent decree documents to fill in the pieces on the offers made by ASCAP of consent decree documents and so forth.

THE COURT: Well, that framework sounds sensible to me. I think it would be absurb for us at ten to four on a Friday afternoon in a case of this magnitude to attempt to delineate whatever loose ends there are and I think all we can do is to plan how we will go about accomplishing that.

Miss Kearse, you look eager.

MISS KEARSE: Yes, your Honor, I have a loose end to create, unfortunately.

THE COURT: What?

MISS KEAPSE: I want to create a loose end, which I think actually can be tied down very simply and expeditiously. We had some deposition designations which unfortunately we did not offer yesterday when we were taking care of this.

There are a few excerpts from the Sipes', Stanton and Paley depositions and then an additional number from the

Poklitar deposition and I don't know that CBS has had time to respond to these designations.

THE COURT: They have been advised?

MISS KEARSE: Yes, they have been given a list of them yesterday. Perhaps we could handle their objections the same way they propose to handle our objections to their documents.

MR. HRUSKA: I have no objection to that procedure, your Honor.

THE COURT: Off the record for a moment, please.

(Discussion off the record.)

THE COURT: Let me state for the record--

MR. HRUSKA: There is one document, your Honor, PX 94, which is the--which is a document supplied to us by ASCAP in connection with pre-trial discovery, the one listing the top 14 publisher groups and their credits and distribution amounts which we thought we had in fact offered and had been received.

In fact I personally have a recollection of it but for some reason the number does not appear in the transcript. Since this is a very significant document, perhaps we could take care of this right now. I am not even sure there is an objection to this document.

THE COURT: Yesterday you offered those top 50.

MR. HRUSKA: ASCAP offered the top 50.

THE COURT: I assume there is no objection to it.

MISS KEARSE: I don't believe we have ever seen this document. It is subject to a prospective order.

MR. TOPKIS: It is a confidential document, your Honor.

MR. HRUSKA: I tink we handled this in the same way we handled the other confidential documents.

THE COURT: Miss Kearse was to have access.

MR. HRUSKA: Right. May it then be received or may the record show that it has been received?

THE COURT: It is received subject to Miss Kearse's right to inspect it.

MR. COLLINS: Your Honor, I would also like to clean up the Hansen documents at this time and read those numbers and ask that they be received on the same basis as the other documents which supported--

THE COURT: Read the numbers.

MR. COLLINS: These were all in my letter. 32, PX 32.

THE COURT: These are all PX?

MR. COLLINS: Yes. PX 34, PX 37, PX 38, PX 39, PX 40 through PX 42.--

THE COURT: Inclusive?

MR. COLLINS: Yes.

MR. TOPKIS: I am lost. What' going on?

THE COURT: These are the designations of the ch and documents that Dr. Southworth--

MR. TOPKIS: This is the Southworth stuff?

THE COURT: Yes.

MR. COLLINS: PX 40 through PX 42. PX 47, PX 57 through PX 81. PX 94 through PX 97. PX 326 through PX 336. And PX 885 through PX 889.

THE COURT: Any comments from counsel?

Those documents are received in evidence.

Miss Kearse were you going to make a statement?

MISS KEARSE: Yes, your Honor. We haven't had a chance to look at these but I see that some of them were objected to by BMI on the grounds of irrelevance and on the grounds that as to BMI they are hearsay.

THE COURT: They are received in evidence subject to BMI's objection which I will rule on if they are preserbed up to that time when we meet to dispose finally of an other loose ends.

I will make a closing statement for the record in an off the record discussion counsel have agreed at the Court's request to meet and agree on a schedule for advising

Court of any further documents to be put into evidence or any further designations of deposition testimony and any objections thereat and also specifying the time at which any other so-called loose ends which, for example, include ruling on exhibits where a party has asked to confer with an opponent in relation to back up material for the exhibits, to be determined.

I think that's a complete sentence.

Gentlemen, I believe that concludes the business--

MR. TOPKIS: Your Honor, could I make a suggestion based on my own experience, and I suspect I am not alone in it.

From the time we stopped in May until we resumed three weeks ago I managed to forget everything I ever knew about this case. I was not unhappy to have that happen but did happen. And it took a great deal of effort to refamiliarize myself. I wonder, your Honor, whether your Honor might not wish instead of letting this case slip into your law clerk's chamber for six months or eight months or whatever, whether we couldn't try something radical like arguing it while it is fresh in your Honor's mind, like perhaps four weeks from today, dispensing with briefs, more briefs, staking them as high as any of us is tall, and getting it resolved.

We are very anxious to have the matter resolved and I know the pressure--

THE COURT: I agree with a lot of what you have said, in fact everything except dispensing with the brief. I think--let me start again.

My general policy is to dispense with as many papers as is possible in any case. With the mountains of evidence we have here and the significance to be attached to it and the fact that throughout the record each side wanted me to rule broadly with regard to the evidence that that side wanted to put in and narrowly with regard to his opponent's, understandably as somebody has said, so I often stated it would be up to the parties to argue the significance of the evidence at a later date.

I do need post-trial memoranda. I am sorry to impose that on you. I am sorry to impose that on myself but I do think that will be necessary.

On the other hand, I do agree with you that we should adopt an approach of keeping the body warm, at least until it is interred, and I would be very pleased to hear argument and if you can, for you to have the briefs ready by that time, by about a month from now, so that I am not setting any specific date at this time but indicating an attitude.

I recognize that it is a bid job to write a brief based on a 5,000 page record which as many documents there are and so on so I will ask the three of you to con-

sider this point of view in reaching agreement as to where we go from here and if there are substantially different points of view about how we should handle it, then, of cours I will be prepared to rule.

MR. TOPKIS: To guide us, your Honor, may I ask a question?

We will try to work out something along the lines that your Honor suggests and I am sure we will be able to.

I just wonder, would your Honor find it preferrab that the plaintiff write a brief first and we respond or that each side write simultaneously and then respond to each other? Whichever practice your Honor would prefer I am sure we will cheerfully adapt to.

THE COURT: Let me give a little thought to that.

MISS KEARSE: Your Honor, before we adjourn, coul we just have the letter designating depositions marked for identification?

THE COURT: Yes.

MISS KEARSE: BX 170.

xx (BX 170 marked for identification.)

MR. TOPKIS: Your Honor, before we adjourn could I express on my behalf and I am sure on my colleagues and friend's belief our great gratitude for your unfailing patience.

THE COURT: You beat me to the punch.

I was going to say considering the burden which any such case as this imposes on everybody involved, it was really a remarkably pleasant experience.

I enjoyed working with you all.

****

December 14, 1973

4734	17	dayt ime	daytime
4734	19	vice president	vice-president
4736	3	televisionthis	television this
4736	12	shoes	shows
4737	14	networks	network's
4737	15	season and it	season, and that
4738	3	that has	that what has
4739	2	extra curri-	extracurri-
4739	3	cula	cular
4739	4	give	given
4739	20	series and we	series. We
4740	14	PX 948	PX 958
4740	19	thislist,	this list,
4741	4	to be	would be
4741	5	show	shows
4741	20	Lilly	Lily
4741	20	Jones	Joyce
4741	25	which will	which we will
4742	2	6r	for
4742	5	the shape of things?	The Shape of Things?
4742	6	shape of things	Shape of Things
4742	15	no relations	relations

4742	15	mairred divorced	married, divorced
4742	16	difference	different
4742	17	wrap around	wraparound
4743	4	hostest	hostess
4743	16	is in	in
4745	3	television industry	at Television City
4745	4	Alan Blythe	with Alan Blyth
4745	6	case we	case where we
4745	6	hell's a poppin	Hellzapoppin
4745	7	embyronic and	embryonic, and
4745	12	is	was
4745	22	Department for	Department about doing a one-hour comedy variety show for
4745	22	Who	He
4745	23	credits	credits.
4745	24	about doing a one-hour comedy variety show.	(delete)
4746	5	Anyone	Any one
4746	10	add a	add, a
4746	13	a terribly	terribly
4746	16	Hew Haw	Hee Haw
4746	18	HeeHaw	Hee Haw
4746	19	National	national

4747	16	that	than
4747	25	than	in
4748	13	Van	Bobby Van
4748	17	Show	show,
4748	18	Nannette	Nanette
4749	3	aluded	alluded
4749	10	plans	CTN's plans
4749	11	season	season's
4749	23	fall out.	fallout.
4750	9	need a show	need a star
4750	19	nine	new
4750	20	Hawn	Hawn,
4750	20	Laugh-In	Laugh-In,
4751	16	Cavett	you have the Cavett
4751	17	Aisde	Aside
4751	18	mid-west	Midwest
4752	10	Diner Clubs	dinner clubs
4752	19	in an	like an
4753	11	of a	of the
4753	14	add in	add that in
4754	10	and in a	and a
4754	11	later a	later she had a
4754	14	ina	in a
4754	21	situations	situations like
4755	13	Chicago,which	Chicago, which
4756	5	Diner Clubs,	dinner clubs,

4756	18	Y our	Your
4757	5	Number	number
4757	15	anhour	an hour
4758	20	beenunsuccessful.	been unsuccessful.
4758	22	question,that	question, that
4759	12	Mr.Silverman	Mr. Silverman
4760	13	thr	three
4761	2	CliftonDavis,	Clifton Davis,
4761	11	word,	world,
4761	12	I am	¶ Q I am
4762	6	comddy?	comedy.
4763	4	Q	THE COURT: (?)
4764	14	mentoned	mentioned
4767	11	youessentially	you essentially
4767	13	happento	happen to
4769	6	as I	as--I
4769	7	rate and	rate -- and
4769	8	high	high,
4769	21	their	that
4769	23	interests, they	interests. They
4770	21	whole members	whole, members
4770	21	proprietors on	proprietors, on
4770	22	ASCAP are	ASCAP, are
4771	4	price,	piece --
4771	5	the price	the market price
4772	16	thinkwhat	think what

4773	13	hypothesis	hypothesis,
4773	14	with	(delete)
4773	16	year the	year, the
4773	17	negotiation or	negotiation, or
4773	23	, setting	setting,
4773	24	system	system,
4774	2	rate. The	rate--the
4774	3	music and	music, and
4774	6	that is to	has to
4774	9	theper	the per
4774	21	their	there
4774	21	withdrawls	withdrawals
4775	18	mightnot	might not
4775	19	be so	be, so
4775	21-22	with. You know,	with, you know,
4776	3	music	music,
4776	12	and	can
4776	15	music	uses
4776	16	of music	of uses
4777	12	think for	think, for
4777	15	up, is	up -- this is
4777	15	not his	not his--
4777	16	them--	them,
4777	16	onlytwo	only two
4777	19	It was	It is

4777	22	substitute.	substitutes.
4778	2	Carol	carol
4778	5	Carols	carols
4778	6	domain. But	domain, but
4778	7	sing but	sing. But
4778	22	call a	call it a
4780	22	operate a	operate as a
4781	8	question.	question?
4783	3	contract N	CTN's
4783	5	,	;
4783	6	were	with
4783	7-8	composers. ¶ This	composers. This
4783	10	that demonstrably falls	that is demonstrably false.
4783	22	anymore	any more
4784	13	probably	probable
4784	20	bargain.	margin.
4785	7	of per	to per
4786	7	adventurers,	adverse,
4786	10	average expect	average he expects
4787	8-9	contract N	CTN
4787	15	change, and	change--and
4787	17	dollars, into	dollars--into
4787	20	for	up for
4787	21	poor	poorer
4787	23-24	contract N	CTN

4788	3	therum	theorem
4788	5	commody	commodity
4788	8	trade offs	tradeoffs
4788	13	accept	spend
4789	11	individuals	individual
4789	18	have it	have
4790	12	things have	things which have
4790	15	First no	First, no
4791	11	from have	from, have
4791	16	high bargains	high, bargains
4791	22	procession	process
4794	4	Well,with	Well, with
4794	8	thinkhe	think he
4794	12	get to	hope to
4794	12	fromwired	from wired
4794	16	predicate	practice
4795	10	Dr.	Mr.
4796	24-25	through that out	through--out that
4797	3	Spinner	Spina
4797	9	Spinner--	Spina--
4797	20	risk will	risk that will
4798	6	anunequivocal	an unequivocal
4798	20	another, it	another it
4798	24	they believe	they would believe
4801	10	inorder	in order

4801	14	runby	run by
4802	5	publishers,your	publishers, your
4802	5	Honor.	Honor?
4802	12	SArdi's	Sardi's
4803	2	made	paid
4805	3	reb ut	rebut
4805	6	predicate	foundation
4806	5	destroy the	destroy their
4806	9	highway man	highwayman
4806	15	tratit	that it
4805	23	even	event
4807	13	producing so	producing, so
4807	18	Burnet	Burnett
4807	23	night club	nightclub
4807	25	upon	on
4808	8	con	can
4808	19	vengence	vengeance
4809	12	bargainig	bargaining
4809	25	personnel	person
4810	2	system the	system, the
4810	2	anyone	any one
4810	4	require	change
4811	2	time.	time?
4811	10	me would	me, would
4812	9	Fisher. We	Fisher, we
4813	9,12	Dr.Steiner	Dr. Steiner

4813	21	gave you	gave, you
4815	11	Dr.Fisher	Dr. Fisher
4816	7	by BMI	by CTN
4816	15	Dr.Fisher's	Dr. Fisher's
4816	23	inthe	in the
4817	18	andDr.Steiner	and Dr. Steiner
4818	17	supposing, for	sup osing for
4818	22	program.	programs.
4818	25	COURT:Dr.	COURT: Dr.
4819	2	Dr.Steiner	Dr. Steiner
4819	24	Honor.	Honor?
4821	6,10	useage	usage
4821	14	visages	envisages
4822	3	protracted	protracted,
4822	7	year,	user,
4822	7	year	user
4822	8	use	used
4822	11	year	user
4822	24	price.	case.
4823	17	years	users.
4823	18	network son	networks on
4824	10	competition	compensation
4824	25	dferred	deferred
4825	2	Mr....Dr.	Dr. ... Mr.
4825	12	from	and

4826	2	can equally,	being equal,
4826	17	intense.	intense."
4827	8	won't	woulan't
4827	8	consummer	consumer
4827	14	restraint	restraints
4827	22	The	(delete)
4827	24	indespensible	indespensable
4828	4	out put	output
4828	17	COURT:	WITNESS:
4828	22	useage	usage
4829	8	peri/	per
4829	24	operats	operates
4831	6-7	corrections. The	corrections in the
4831	13-14	line. Beginning	line beginning
4831	19	few sentences	new sentence
4831	22	one	"one"
4831	23	seller	sellers
4833	7	eidtor	editor
4833	11	And, Dr.	Dr.
4833	18	Yes, I do.	Yes.
4835	15	things	thinks
4835	21	THE COURT:	THE WITNESS:

4836	3	thereare	there are
4836	5	One, are	One is
4836	13	as in	in
4836	21	having no	having
4837	24	like several	or several
4840	10	which was	in which what was
4840	10	easle	easel
4840	24	saying the	saying that the
4842	22	nindicated	indicated
4843	5	produce	products
4843	9	ofwhich	of which
4843	18	1960.	1953.
4844	13	inputting	in putting
4844	18	meknow.	me know.
4844	23	his customers'	the cost of his
4845	5	trend generally	trend was generally
4845	13	mycollected	my collected
4845	23	aluminum company	Aluminum Company
4846	4	are	for
4846	9	aluminum company	Aluminum Company
4846	12-13	revenues. ¶ The	revenues, the
4847	19	300,	AX 300,
4848	6	there is	(delete)

4848	7	ASCAP. Not	ASCAP, but that is not
4848	10	$10,000. The	$10,000, the
4848	16	The PX948	PX 948
4848	19	onthe	on the
4848	23	market how	market, how
4850	5	fromCBS	from CBS
4850	6	Nathan per	Nathan - per
4850	7	earnings,	earnings
4850	7	pictures,	picture workers,
4850	7	earning,	earnings
4850	11	is going	are going
4850	11	far as	fast as
4850	13	workers.	workers;
4850	14	Or at	at
4850	21	is over the last	is the far
4850	22	one,	chart,
4851	7	record. The	record as well as the
4851	8	them, PX932,	them. The charts are PX932,
4851	13	thenumbers	the numbers
4852	3	license	lines
4852	15	(Exhibits PX940,	(Exhibits PX932, 934, 935, 936, 938, 939, 940
4852	15	943, 945,	943, 944, 945,
4852	16	947, 948A,	947, 948, 948A,
4852	16	948A, 951,	948A, 949, 950, 951,
4852	16	953, 955,	953, 954, 955,

4853	4	Dr.Fisher	Dr. Fisher	4873- 13
4853	6	songwriter composer	songwriter, composer	
4853	24	Ballgame	Ball Game	
4853	25	theBallgame	the Ball Game	
4854	4	base ball	baseball	
4854	14	wouldyou	would you	
4855	7	ninth	ninetieth	
4855	9	hewho	he who	
4856	17	middle	more valuable	
4857	6,10	Brice	Bryce	
4857	12	Solo	Sole	
4857	20	Mr.Brettler	Mr. Brettler	
4857	25	CBS he	CBS, he	
4858	11	Mr.Brettler	Mr. Brettler	
4859	15,20	Mr.Brettler	Mr. Brettler	
4859	20	think that	think what	
4860	2	Mr.Brettler	Mr. Brettler	
4861	8	bargainswith	bargains with	
4862	13	Mr.Green	Mr. Green	
4863	8	risks the	risks to the	
4864	3	over simplifying	over-simplifying	
4865	25	designate the	designate to the	
4865	25	sides,	side,	
4866	10	absurb	absurd	
4866	24	Sipes',	Sipes,	
4868	6	prospective	protective	
4868	9	tink	think	
4869	10	57	75	
4869	20	if	and	

4869	21	serbed	served
4869	23	record	record.
4869	24	in	In
4870	2	Court	the Court
4870	4	thereat	thereto
4870	23	staking	stacking
4871	24	bid	big
4871	25	which	with
4871	26	there	as there
4872	22	colleagues	colleagues'
4872	24	belief	behalf

Very truly yours,

Max Gitter
Paul, Weiss, Rifkind, Wharton
& Garrison
345 Park Avenue
New York, New York

Herbert E. Sloan
Hughes Hubbard & Reed
One Wall Street
New York, New York

Robert M. Sondak
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(5151-R)